Supreme Court of the United States

October Term, 1978

No. 78-756

STATE OF OHIO,
Petitioner,

vs.

HERSCHEL ROBERTS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

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OPINIONS BELOW

The opinion and judgment of the court below giving rise to this petition are as follows:

State of Ohio v. Roberts, 55 Ohio St. 2d 191, 378 N.E.2d 492, ... Ohio Ops. ..... (1978)

A copy of said opinion is appended.

JURISDICTIONAL STATEMENT

The opinion and judgment of the Supreme Court of Ohio herein was rendered July 19, 1978. No motion for a rehearing was filed.

This court has jurisdiction to review this matter upon certiorari pursuant to 28 U.S.C., Section 1257(3), in that the validity of Section 2945.49, Ohio Revised Code, has been drawn into question on the ground that it is repugnant to the Sixth Amendment to the Constitution of the United States.

QUESTION PRESENTED FOR REVIEW

Where a witness, called by a criminal defendant at a preliminary hearing, testifies in a manner incriminating the defendant and was not cross-examined although there was opportunity to do so, is later shown to be unavailable to testify at the trial of the same defendant on the same charge, does the confrontation clause of the Sixth Amendment to the Constitution of the United States preclude the State's use of the witness' recorded testimony?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment, Constitution of the United States

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

Section 2945.49, Ohio Revised Code

Testimony taken at an examination or a preliminary hearing at which the defendant is present, or at a former trial of the cause, or taken by deposition at the instance of the defendant or the state, may be used whenever the witness giving such testimony dies, or cannot for any reason be produced at the trial, or whenever the witness has, since giving such testimony, become incapacitated to testify. If such former testimony is contained within a bill of exceptions, or authenticated transcript of such testimony, it shall be proven by the bill of exceptions, or transcript, otherwise by other testimony.

STATEMENT OF THE CASE

The facts underlying this case which are germane to this appeal are as follows:

The defendant, Herschel Roberts, was arrested in Lake County, Ohio, on January 7, 1975, and charged with forgery. Later, additional charges of receiving and concealing stolen property and possession of heroin were brought.

Shortly after defendant's arrest, a preliminary hearing was held in which witnesses were called both by the State of Ohio and by the defendant. One of the witnesses *called on behalf of the defendant,* Anita Isaacs, testified in such a manner that incriminated the defendant. Counsel for defendant had, but did not exercise, an opportunity to declare her a hostile witness and cross-examine. At the conclusion of said preliminary hearing, the defendant was bound over to the Lake County Common Pleas Court.

Numerous trial dates were set in Common Pleas Court. As a result of continuances all occasioned on the part

of the defendant and his leaving the jurisdiction, however, trial was not held until March 4, 1976.

During defendant's March 4, 1976 trial, the State of Ohio offered as evidence, and the Court admitted over defendant's objections, a transcript of Anita Isaac's preliminary hearing testimony, admissible pursuant to Section 2945.49 of the Ohio Revised Code, the witness Anita Isaacs being an unavailable witness pursuant to said Section.

Prior to the admission of the recorded preliminary hearing testimony of Anita Isaacs, her mother, Amy Isaacs, was questioned outside the hearing of the jury to determine the whereabouts of Anita Isaacs, the last time Anita had been seen by her mother or father, and whether or not Amy Isaacs had had any communication with her daughter (R. 193-199). Amy Isaacs testified that she had not been in contact with or had word of her daughter for 13 months (R. 194) other than two telephone calls; one received from Anita in which Anita did not indicate her whereabouts but indicated she was not in the State of Ohio (R. 194), and another from a California social worker who indicated that Anita was trying to obtain welfare in California (R. 196). Mrs. Isaacs also testified that neither her husband nor any of her friends or relatives had been in any communication with Anita Isaacs, and that Anita's whereabouts were unknown (R. 195).

Counsel for defendant objected to the introduction of the recorded testimony at R. 274-275, viz:

> "The Court: Are you acquainted with the testimony about to be heard?
>
> Mr. Plasco: Your Honor, for the record, I was furnished the day before trial with a copy of a transcript that allegedly took place at a preliminary hearing in the Mentor Municipal Court on January 10,

> 1975. I have a number of objections to the admissibility of said transcript into evidence, or being read to the jury in the present case at bar.
>
> The Court: Proceed.
>
> Mr. Plasco: Thank you, your Honor. To begin with, I'm objecting to the constitutionality of Ohio Revised Code Section 2945.49. The general purpose of a preliminary hearing is a discovery tool where the defense attorney attempts to get information out so he can best represent his client. It is not to eliminate hearsay. Many times hearsay evidence is intentionally left in so the defense attorney can get more information. * * *"

Defendant's counsel continued his objections through R. 277, specifically stating therein:

> "Mr. Plasco: I further object your Honor, * * *
>
> * * * * *
>
> For these reasons, we would strongly object to the admissibility of the transcript as being prejudicial to Mr. Roberts' rights in violation of the U.S. Constitution—confrontation of witnesses, allowing hearsay testimony into evidence. Thank you."

Although the trial judge did not specifically overrule defendant's objections, he did say, at R. 278:

> "The Court: That's the danger that you take when you conduct a fishing expedition in a preliminary, instead of going by the new rules providing for discovery. Proceed, Mr. Perez?
>
> Mr. Perez: Proceed with argument, or proceed with—
>
> The Court: With your transcript."

The defendant was found guilty by the jury on counts of forgery, receiving stolen property, and possession of heroin, and subsequently appealed the convictions to the Lake County Court of Appeals on the question presented herein. The Court of Appeals reversed the judgment of the trial court on the grounds that the admission of the preliminary hearing testimony violated the defendant's Sixth Amendment right to confrontation of witnesses, and because the State had failed to make a sufficient effort to locate the missing witness.

After allowing a motion filed by the State of Ohio to certify the record, the Ohio Supreme Court affirmed the judgment of the Court of Appeals. The Ohio Supreme Court held, as a matter of state law, that the language of the statute, "whenever the witness . . . cannot for any reason be produced," is satisfied by a showing that the witness has disappeared; that her whereabouts were entirely unknown.

But by a 4-3 majority, the Ohio Supreme Court affirmed the reversal of the conviction, holding that notwithstanding several U.S. Supreme Court decisions *contra*, the confrontation clause of the Sixth Amendment was offended in this situation because the witness was not actually cross-examined.

It is from the judgment of the Ohio Supreme Court that the State of Ohio seeks a writ of certiorari.

ARGUMENT

I.

In several decisions[1] during the past decade, this court has reviewed the import and effect of the confrontation clause of the Sixth Amendment to the Constitution of the United States on the use of various types of out-of-court statements sought to be introduced in criminal cases.

There is no need in this petition to cite authority for the proposition that the Sixth Amendment is applicable to the states via the Fourteenth; nor are cases necessary to support the proposition that the confrontation right is to be measured by the same standard in both federal and state prosecutions.

But what must be cited here is the common thread linking all the recent "confrontation cases"—the theory that the confrontation right is satisfied provided counsel for a criminal defendant has an *opportunity* to cross-examine the witnesses against his client.

In *Pointer v. Texas, infra* at fn. 1, the state introduced at a criminal trial the transcript of testimony given at a preliminary hearing of the case. The witness who had given the preliminary hearing testimony had moved out of the state and was unavailable to testify at trial. The defendant, who was unrepresented at the preliminary hearing, was not given the opportunity to cross-examine the witness.

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1. *Mancusi v. Stubbs*, 408 U.S. 204, 33 L. Ed. 2d 293, 92 S. Ct. 2308 (1972); *Dutton v. Evans*, 400 U.S. 74, 27 L. Ed. 2d 213, 91 S. Ct. 210 (1970); *California v. Green*, 399 U.S. 149, 26 L. Ed. 2d 489, 90 S. Ct. 1930 (1970); *Barber v. Page*, 390 U.S. 719, 20 L. Ed. 2d 255, 88 S. Ct. 1318 (1966); *Pointer v. Texas*, 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965).

This court held, at 380 U.S. 407-408, 13 L. Ed. 2d at 928:

> "Because the transcript of (the witness') statement offered against petitioner at his trial had not been taken at a time and under circumstances affording petitioner through counsel an adequate *opportunity* to cross-examine the witness, its introduction in a federal court in a criminal case against Pointer would have amounted to a denial of the privilege of confrontation guaranteed by the Sixth Amendment." (Emphasis added.)

In *Barber v. Page, supra* at fn. 1, Barber's co-conspirator inculpated him during testimony at the preliminary hearing. Barber's attorney had every opportunity to, but did not, cross-examine.[2] By the time of Barber's trial, the co-conspirator was incarcerated in a federal prison 225 miles away from the trial forum, and in another state. The prosecution knew of the co-conspirator's location, but made no attempt to bring him to testify, relying instead on a transcript of the preliminary hearing testimony. This court reversed the conviction.

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2. This was the situation herein. Counsel for defendant had called Anita Isaacs to testify at the preliminary hearing and was surprised by her incriminating testimony of his client. He had every opportunity to ask the court to declare the witness hostile and proceed to cross-examine, but did not. Whether a witness is declared hostile or not is within the sound discretion of the trial court. *State of Ohio v. Parrott*, 27 Ohio St. 2d 205, 56 Ohio Ops. 2d 124, 272 N.E.2d 112, *cert. den.* 405 U.S. 1040, 31 L. Ed. 2d 580, 92 S. Ct. 1306 (1971); *State of Ohio v. Minneker*, 27 Ohio St. 2d 155, 56 Ohio Ops. 2d 97, 271 N.E.2d 821 (1971), citing, at 27 Ohio St. 2d 158, 271 N.E.2d 824; *United States v. Duff*, 332 F.2d 702 (C.A. Mich., 1964) and 98 C.J.S. Witnesses, section 368, fn. 86, p. 120. Counsel for defendant, by not asking the court to declare Anita Isaacs hostile, thus did not ask the court to exercise its discretion. This failure on the part of defense counsel cannot be imputed to the state.

It noted, at 390 U.S. 722, 20 L. Ed. 2d 258:

> "It is true that there has traditionally been an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that defendant. E. g., *Mattox v. United States, supra* (witnesses who testified in original trial died prior to the second trial). This exception has been explained as arising from necessity and has been justified on the ground that the *right of cross-examination initially afforded* provides substantial compliance with the purposes behind the confrontation requirement. See 5 Wigmore, Evidence Sections 1395-1396, 1402 (3d ed 1940), C. McCormick, Evidence Sections 231, 234 (1954)." (Emphasis added.)

Barber turned on the failure of the State of Oklahoma to expend the minimal effort needed to secure the presence of the co-conspirator, a failure which correctly justified reversal. And on those facts, this court observed, at 390 U.S. 725-726, 20 L. Ed. 2d 260:

> "While there may be some justification for holding that the *opportunity* for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable, this is not, as we have pointed out, such a case." (Emphasis added; footnotes omitted.)

In *California v. Green, supra* at fn. 1, a similar transcript was introduced to impeach a witness whose trial testimony was far less favorable to the prosecution than the same witness' preliminary hearing testimony. The California Supreme Court reversed the conviction of Green, holding that a state statute which authorized such introduction of recorded preliminary hearing testimony violated the

confrontation clause.[3] This court said, at 399 U.S. 153, 26 L. Ed. 2d at 494:

> "The California Supreme Court construed the confrontation clause of the Sixth Amendment to require the exclusion of (the witness') prior testimony offered in evidence to prove the State's case against Green because, in the court's view, neither the right to cross-examine Porter at the trial concerning his current and prior testimony, nor the *opportunity to cross-examine Porter at the preliminary hearing* satisfied the commands of the Confrontation Clause. We think the California court was wrong on *both* counts." (Emphasis added.)

Green admittedly involved a situation where the witness whose prior recorded testimony was used was present at trial and not unavailable as in *Pointer* and the case herein. But this court found such a distinction not to be relevant at 399 U.S. 165, 26 L. Ed. 2d 501:

> "We also think that Porter's preliminary hearing testimony was admissible as far as the Constitution is concerned wholly apart from the question of whether respondent had an effective opportunity for confrontation at the subsequent trial. For Porter's statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial. Porter was under oath; respondent was represented by counsel—the same counsel in fact who later represented him at the trial; respondent had *every opportunity* to cross-examine Porter as to his statement; and the proceedings were

3. A highly analogous situation is present in this case, where the Ohio Supreme Court has severely limited the applicability of a similar state statute on identical grounds.

> conducted before a judicial tribunal, equipped to provide a judicial record of the hearings. Under these circumstances, Porter's statement would, we think, have been admissible at trial even in Porter's absence if Porter had been actually unavailable, despite good-faith efforts of the State to produce him. That being the case, we do not think a different result should follow where the witness is actually produced." (Emphasis added.)

In *Dutton v. Evans, supra* at fn. 1, a federal habeas corpus action, out-of-court incriminatory statements made by a co-conspirator about the defendant were testified to by a second co-conspirator. The second co-conspirator was then cross-examined by defendant's counsel. It was alleged that introduction of this hearsay violated the confrontation clause. This court held otherwise, noting the strong case against the defendant and the probable harmless nature of the error, if any. (Blackmun, *J.*, concurring).

Mr. Justice Harlan, concurring in the result, noted significantly at 400 U.S. 95, 27 L. Ed. 2d 230:

> "If one were to translate the confrontation clause into language in more common use today, it would read: 'In all criminal prosecutions, the accused shall enjoy the right to be present and (the right) to cross-examine the witnesses against him.' "

And even in his dissent, Marshall, *J.*, notes, after reviewing the pertinent cases at 400 U.S. 103, 27 L. Ed. 2d 235:

> "The teaching of this line of cases seems clear: absent the *opportunity* for cross-examination, testimony about the incriminating and implicating statement made by Williams was constitutionally inadmissible in the trial of Evans." (Emphasis added.)

The plurality opinion in *Dutton, supra*, notes that the basic test of admissibility of *any* out-of-court statement is the "indicia of reliability"[4] regarding the statement.

In *Mancusi v. Stubbs, supra* at fn. 1, this court held, at 408 U.S. 216, 33 L. Ed. 2d 303:

> "Since there was an adequate *opportunity* to cross-examine (unavailable witness) Holm at the first trial, and counsel for Stubbs availed himself of that opportunity, the transcript of Holm's testimony in the first trial bore sufficient 'indicia of reliability' and afforded 'the trier of fact a satisfactory basis for evaluating the truth of the prior statement.' " (Citing *Dutton.*)[5] (Emphasis added.)

II.

Despite all of the cases cited above—and the common concept in each that *opportunity* for cross-examination is the gravamen of the confrontation clause—the Ohio Supreme Court chose to hold that without *actual* cross-examination, the transcript of unavailable witness' testimony could not later be used.[6] The Ohio Supreme Court

4. 400 U.S. at 88-89; 27 L. Ed. 2d 227.

5. The only factual differences between *Stubbs* and the case herein are that (1) the opportunity for cross-examination existed at trial in *Stubbs* but at a preliminary hearing herein, and (2) that counsel for defendant availed himself of that opportunity in *Stubbs*. See fn. 2, *supra*. Yet the preliminary hearing was "a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine." See *Pointer, supra* at 399 U.S. 165, 26 L. Ed. 2d 501.

6. The syllabus to the opinion in the Ohio Supreme Court reads:

> "Where a witness, who testified against defendant at preliminary hearing and was not cross-examined, is later shown to be unavailable to testify at the trial, the Sixth Amendment to the United States Constitution precludes the state's use of the witness' recorded testimony, notwithstanding R.C. 2945.49."

chose to base its decision not upon any state grounds, but rather on the confrontation clause of the Sixth Amendment to the Constitution of the United States.[7]

Since the Ohio Supreme Court has thus decided a federal question of substance in a way probably not in accordance with the applicable decisions of this court, sound discretion should be exercised to grant certiorari herein.

Respectfully submitted,

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7. Since the original objection to the use of the transcript of Anita Isaacs' testimony at trial, much has been made of the notion that a preliminary hearing should be a discovery tool for the defense. See Statement of the Case, *supra*, at 4. The Ohio Supreme Court made much of this notion in their opinion at 55 Ohio St. 2d 196. But as the trial judge correctly noted, *supra*, at 4, the time and manner of discovery is set forth in Ohio's Rules of Criminal Procedure. And the dissent of the Ohio Supreme Court correctly noted, at 55 Ohio St. 2d 200: "The extent of cross-examination, whether at a preliminary hearing or at trial, is a trial tactic. The manner of use of that trial tactic does not create a constitutional right."

APPENDIX

OPINION OF THE OHIO SUPREME COURT

(Decided July 19, 1978)

No. 77-530

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

THE STATE OF OHIO,
Appellant,

vs.

HERSCHEL ROBERTS,
Appellee.

Where a witness, who testified against the defendant at preliminary hearing and was not cross-examined, is later shown to be unavailable to testify at the trial, the Sixth Amendment to the United States Constitution precludes the state's use of the witness' recorded testimony, notwithstanding R. C. 2945.49.

APPEAL from the Court of Appeals for Lake County.

The Mentor police arrested the defendant, Herschel Roberts, on January 7, 1975, and charged him with forging a check in the name of Bernard Isaacs, and with receiving stolen property, namely, a number of credit cards belonging to Bernard Isaacs and his wife, Amy.

On January 10, the defendant came before the Mentor Municipal Court for preliminary hearing. At the hearing,

the defendant offered the testimony of Anita Isaacs, the daughter of Bernard Isaacs. She testified that she had become friends with her classmate's younger sister, who was Roberts' girl friend, and that she had seen Roberts occasionally since June or July of 1974. On December 23, 1974, she had given the key of her apartment to Roberts' girl friend, and had told her it would be all right if she and Roberts used the apartment while she was away for the next few days. When she returned on December 30, Roberts said he was having trouble finding a place to stay, so she let Roberts go on using the apartment while she stayed at the home of a friend. She never spent any time in her apartment with Roberts.

Having thus described her acquaintance with Roberts, the witness denied ever having given him her parents' credit cards, and she denied ever having talked to him about giving him the credit cards to help him pay for a television. Roberts' attorney did not ask to have the witness declared hostile, and he did not ask to examine her as on cross-examination.

The Municipal Court bound Roberts over to the grand jury which indicted him for receiving stolen property, R. C. 2913.51, and forgery, R. C. 2913.31. The grand jury also returned a secret indictment against Roberts for receiving stolen property, namely, silverware and appliances belonging to Mr. and Mrs. Isaacs, and for possession of heroin, R. C. 3719.09. The Court of Common Pleas of Lake County consolidated the proceedings on the two indictments and set the trial for July 17, 1975.

The case was continued six times, and the trial finally took place on March 4, 1976. Between November 1975, and February 1976, the trial court issued five subpoenas for four different trial dates to Anita Isaacs at her parents'

address. It is undisputed that the last three subpoenas, showing returns on December 10, 1975, February 3, 1976, and February 25, 1976, respectively, all carried instructions to "please call before appearing." The witness never telephoned, nor did she appear at the trial.

At the trial, the prosecutor and the defense attorney both questioned Amy Isaacs on *voir dire* to determine whether Anita Isaacs was available to testify. Mrs. Isaacs testified that at the end of January 1975, Anita had left home for Tucson. She said that in April or May, she had received a form from a welfare office in San Francisco stating that Anita had applied for welfare. Mrs. Isaacs had used the address on the form to locate the social worker who was dealing with Anita. She had then talked to the social worker by telephone, and had spoken to Anita by telephone that same day. Later in the summer, Anita had called her parents and had indicated that she was traveling somewhere outside Ohio. From January 1975 to the date of the trial, neither Anita's parents nor any other relative had received any other communication from Anita. Mrs. Isaacs testified that she did not know what state Anita was in, and that she did not know how to contact Anita.

Citing R. C. 2945.49,[1] the prosecutor offered to introduce the transcript of the testimony which Anita had given at the preliminary hearing on the grounds that the

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1. R. C. 2945.49. "Testimony taken at an examination or a preliminary hearing at which the defendant is present, or at a former trial of the cause, or taken by deposition at the instance of the defendant or the state, may be used whenever the witness giving such testimony dies, or cannot for any reason be produced at the trial, or whenever the witness has, since giving such testimony, become incapacitated to testify. If such former testimony is contained within a bill of exceptions, or authenticated transcript of such testimony, it shall be proven by the bill of exceptions, or transcript, otherwise by other testimony."

witness was unavailable to testify in person. The court admitted the transcript over objection. The jury convicted the defendant on all counts, and the court entered judgment.

The Court of Appeals reversed. It held that by admitting the recorded testimony, the trial court had violated the defendant's right to confront adverse witnesses, as guaranteed by the Sixth Amendment to the United States Constitution.

The cause is before this court upon the allowance of the state's motion for leave to appeal.

Mr. John E. Shoop, prosecuting attorney, and Mr. Richard J. Perez, for appellant.

Messrs. Stoneman, Plasco & Bean and Mr. Marvin R. Plasco, for appellee.

O'NEILL, *C. J.* The issue before this court is as follows: When a witness testifies against the accused at a preliminary hearing and is not cross-examined, and the witness is later shown to be unavailable to testify at the trial, may the prosecution introduce the witness' recorded testimony pursuant to R. C. 2945.49?

The confrontation clause of the Sixth Amendment to the Constitution of the United States, which applies to the states by virtue of the Fourteenth Amendment, *Pointer v. Texas* (1965), 380 U. S. 400, requires that "[i]n all criminal prosecutions, the accused shall * * * be confronted with the witnesses against him * * *." Although confrontation serves the subordinate function of letting the jury see the witness' demeanor, its main purpose is to guarantee the accused the right to cross-examine. See *Mattox v. United States* (1895), 156 U. S. 237. It has even been said that the right to cross-examine and the

right of confrontation are "the same right under different names." 5 Wigmore on Evidence, 155, 158, Section 1397 (Chadbourne Ed. 1974). Thus, if a witness who is unavailable to testify in a criminal trial has already testified against the defendant, subject to cross-examination, in a judicial proceeding concerning substantially the same issues, the main concern of the confrontation clause is satisfied, and the state may introduce the witness' prior recorded testimony. See *Mattox, supra;* Wigmore, *supra,* 90, Section 1386. If, however, the witness is available, then the state must still produce him in person so as to serve the additional purpose of showing his demeanor to the jury. See *Mattox, supra*; Wigmore, *supra,* 154, Section 1396; cf. *New York Central R. R. v. Stevens* (1933), 126 Ohio St. 395, 185 N. E. 542. If the witness is outside the court's jurisdiction, and if the prosecutor knows his whereabouts, the state may introduce his prior recorded testimony only after proving that it made a good-faith effort to obtain his actual presence. *Barber v. Page* (1968), 390 U. S. 719.

In the instant cause the appellee argues that the state failed to show a good-faith effort to produce the witness in person, as required by the rule in *Barber.* But in *Barber,* the government knew where the absent witness was. In the instant cause, the reason for the witness' unavailability was not that she was at some known location beyond the court's power of subpoena, but that her whereabouts were entirely unknown; and it is recognized that a witness who has disappeared from observation is unavailable for purposes of the confrontation clause. Wigmore, *supra,* 215, Section 1405, and cases therein cited. As a matter of state law, R. C. 2945.49, authorizing the use of prior recorded testimony "whenever the witness * * * cannot for any reason be produced," is broad enough to cover instances where the witness has disappeared.

The burden was on the state to show that the witness was unavailable by reason of her disappearance. Wigmore says that "such a disappearance is shown by the party's *inability to find* [the witness] after diligent search," but *New York Central R. R. v. Stevens, supra,* at page 405, suggests that in Ohio it is sufficient if the proponent of the prior testimony shows that "by diligence * * * [the witness'] attendance could not have been procured," at least in a civil case.

We see no reason not to follow the same rule in a criminal proceeding. We hold that in the present cause, the trial judge could reasonably have concluded from Mrs. Isaacs' *voir dire* testimony that due diligence could not have procured the attendance of Anita Isaacs. The last definite word of Anita's whereabouts was that she was in San Francisco in April or May of 1974. Later, her parents learned that she was "traveling" somewhere outside Ohio. From this the trial judge could reasonably infer that Anita had left San Francisco, and that it would have been fruitless for the prosecution to have contacted the San Francisco social worker in order to locate Anita. Therefore, the trial judge could properly hold that the witness was unavailable to testify in person.

Nevertheless, the trial court erred in admitting the testimony. As noted earlier, prior recorded testimony of an unavailable witness is admissible against a criminal defendant only if the testimony was given subject to cross-examination by the defendant in a judicial proceeding concerning substantially the same issues. The issues at the trial and the issues at the prior proceeding must be similar enough so that the cross-examination to which the defendant was subjected at the earlier proceeding can be held adequate for purposes of the trial.

In the cause at bar, the basic factual issues—*e. g.*, whether the defendant had stolen the credit cards—were the same. The ultimate factual issues, however, were quite different. At trial, the ultimate issue was the defendant's guilt beyond a reasonable doubt. At the preliminary hearing, in contrast, the ultimate issue was whether there was probable cause to believe that a crime had been committed and that the defendant had committed it. The difference in the ultimate object of proof makes a great difference in the defense attorney's strategy. At trial, defense counsel will cross-examine whenever he may be able to raise a reasonable doubt of the defendant's guilt. Therefore, he will often cross-examine extensively both as to the material elements of the crime charged and also for impeachment purposes. At a preliminary hearing, on the other hand, there is seldom any hope that cross-examination will persuade the judge not to bind the defendant over, and the danger of disclosing unfavorable facts to the prosecution makes extensive cross-examination risky. As the court said in *Government of the Virgin Islands v. Aquino* (C. A. 3, 1967), 378 F. 2d 540, 549, "The fear of adding to the government's case by extensive cross-examination weighs heavily on a defendant's counsel at a preliminary hearing, where much of the government's case still remains in doubt * * *. Everyday experience confirms the difference [between trial and preliminary hearing], for it is rare indeed that on a preliminary hearing there will be that full and detailed cross-examination which the witness would undergo at the trial. Credibility is not the issue at a preliminary hearing as it is in a trial. All the arts of cross-examination which are exerted to impair the credibility of a witness are useless in a preliminary hearing." See, also, *California v. Green* (1970), 399 U. S. 149, 189 (Brennan, J., dissenting).

Thus, the restriction of the factual issue at preliminary hearing restricts the scope of the cross-examination which defense counsel can prudently conduct. Therefore, the mere oportunity to cross-examine at the preliminary hearing can not be said to afford confrontation for purposes of the trial. Accordingly, we hold that, where a witness, who testified against the defendant at preliminary hearing and was not cross-examined is later unavailable to testify at the trial, the Sixth Amendment precludes the state's use of the witness' recorded testimony, notwithstanding R. C. 2945.49.

The holding in *Barber v. Page, supra,* requires this result. In that case, the defendant was on trial in Oklahoma for armed robbery. The state's main evidence was the recorded testimony which a certain witness had given at the preliminary hearing. The defendant's attorney had not cross-examined at the hearing. Since the witness was in prison in Texas at the time of the trial, and since the prosecution had made no effort to produce the witness in person, the United States Supreme Court held that the introduction of his prior recorded testimony violated the defendant's right of confrontation. The state argued that the defendant had waived his right to confront the witness by not cross-examining at the hearing, but the court held, at page 725, "That contention is untenable. Not only was petitioner unaware that * * * [the witness] would be in a federal prison at the time of his trial, but he was also unaware that, even assuming * * * [the witness'] incarceration, the State would make no effort to produce * * * [the witness] at trial. To suggest that failure to cross-examine in such circumstances constitutes a waiver of the right of confrontation at a subsequent trial hardly comports with this Court's definition of a waiver as 'an intentional relinquishment or abandonment of a known right or privilege.' "

The later case of *California v. Green, supra,* does not hold otherwise. There, a 16 year-old witness named Melvin Porter sold marijuana to an undercover agent, and then named Green as his supplier. Green was charged with selling to a minor. Porter testified at preliminary hearing, and was cross-examined. At trial, Porter again testified, but was evasive and uncooperative. So the prosecutor introduced Porter's prior testimony under a statute allowing statements that would otherwise have been admissible only for impeachment to be introduced also for the truth of the matter asserted. Green was convicted, and the California Supreme Court reversed, holding that the statute was unconstitutional under the confrontation clause.

The United States Supreme Court reversed, holding that the use of the prior testimony did not violate the Sixth Amendment because the declarant was available in person at the trial itself to be cross-examined as to his earlier statement. Thus, the case does not directly concern witnesses who are unavailable to testify at the trial in person. The opinion includes a dictum upon which the appellant in the present cause argues that the mere opportunity to cross-examine at preliminary hearing will always satisfy the confrontation clause.[2] The dictum, how-

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2. "We also think that Porter's preliminary hearing testimony was admissible as far as the Constitution is concerned wholly apart from the question of whether respondent had an effective opportunity for confrontation at the subsequent trial. For Porter's statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial. Porter was under oath; respondent was represented by counsel—the same counsel in fact who later represented him at the trial; respondent had every opportunity to cross-examine Porter as to his statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings. Under these circumstances, Porter's statement would, we think, have been admissible at trial even in Porter's

(*Continued on following page*)

ever, must be interpreted in light of the facts. The preliminary hearing in *Green* was quite atypical in that the witness' "story * * * was subject to extensive cross-examination by * * * [defendant's] counsel." *Green, supra,* at page 151. Thus, the case goes no further than to suggest that cross-examination actually conducted at preliminary hearing *may* afford adequate confrontation for purposes of a later trial. In the instant cause, of course, the witness was never cross-examined.

Because the Court of Appeals correctly held that the use of the witness' prior recorded testimony infringed the appellee's Sixth Amendment right of confrontation, its judgment will be affirmed.

Judgment affirmed.

W. BROWN, P. BROWN and SWEENEY, *JJ.*, concur.

HERBERT, CELEBREZZE and LOCHER, *JJ.*, dissent.

CELEBREZZE, *J.*, dissenting. The majority concedes that the trial judge properly held that the witness was unavailable to testify. Nevertheless, the majority concludes that the trial court erred in admitting in evidence the prior recorded testimony presented by this witness during the preliminary hearing, at which appellee and

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Footnote continued—

absence if Porter had actually been unavailable, despite good-faith efforts of the state to produce him. That being the case, we do not think a different result should follow where the witness is actually produced.

"* * * If Porter [the witness] had died or was otherwise unavailable, the Confrontation Clause would not have been violated by admitting his testimony given at the preliminary hearing—the right of cross-examination then afforded provides substantial compliance with the purposes behind the confrontation requirement, as long as the declarant's inability to give live testimony is in no way the fault of the State." *California v. Green* (1970), 399 U. S. 149, at pages 165-66.

his attorney were present. This rather incongruous result is reached by indulgence in conjecture relative to the trial tactics of defense counsel, and is supported only by the highly subjective opinion that "* * * the mere opportunity to cross-examine at the preliminary hearing can not be said to afford confrontation for purposes of the trial."

The decision of the majority is not compelled by either *Barber v. Page, supra,* or *California v. Green, supra.* The holding in *Barber* was obviously based upon the state's failure to make a good-faith effort to produce its witness at trial, since the high court recognized that "* * * there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable * * *." *Barber,* at pages 725-726. Similarly, in the course of holding that the confrontation clause was not violated by admission in evidence of the prior recorded testimony of a later reluctant witness, the Supreme Court, in *California v. Green, supra,* at page 165, observed that "* * * respondent had every opportunity to cross-examine * * * [the witness] as to his statement." Furthermore, in *Pointer v. Texas, supra,* wherein the high court held that the prior recorded testimony of an unavailable witness could not be admitted in evidence at trial because counsel had not been appointed to assist the defendant at the preliminary hearing, it was noted that "* * * [t]he case before us would be quite a different one had * * * [the witness'] statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine." *Pointer,* at page 407.

In my opinion the Sixth Amendment to the United States Constitution does not prohibit, under the facts of the instant cause, the admission in evidence of the witness' recorded testimony. As was stated in *United States v. Allen* (C. A. 10, 1969), 409 F. 2d 611, 613, "* * * the test is the opportunity for full and complete cross-examination rather than the use which is made of that opportunity. * * * The extent of cross-examination, whether at a preliminary hearing or at a trial, is a trial tactic. The manner of use of that trial tactic does not create a constitutional right."

Accordingly, I would reverse the judgment of the Court of Appeals.

HERBERT and LOCHER, *JJ.*, concur in the foregoing dissenting opinion.

JUDGMENT ENTRY OF THE OHIO SUPREME COURT

(Dated July 19, 1978)

No. 77-530

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

STATE OF OHIO,
Appellant,

vs.

HERSCHEL ROBERTS,
Appellee.

APPEAL FROM THE COURT OF APPEALS FOR LAKE COUNTY

This cause, here on appeal from the Court of Appeals for Lake County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed; for the reasons set forth in the opinion rendered herein.

MANDATE OF THE OHIO SUPREME COURT

(Dated July 19, 1978)

No. 77-530

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

STATE OF OHIO,
Appellant,

vs.

HERSCHEL ROBERTS,
Appellee.

MANDATE

To the Honorable Common Pleas Court Within and for the County of Lake, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals affirmed for the reasons set forth in the opinion rendered herein.

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

(Filed in the Ohio Supreme Court September 20, 1978)

Case No. 77-530

IN THE SUPREME COURT OF OHIO
COLUMBUS, OHIO

STATE OF OHIO,
Plaintiff-Appellant,

vs.

HERSCHEL ROBERTS,
Defendant-Appellee.

NOTICE OF APPEAL

Now comes the State of Ohio, by and through John E. Shoop, Prosecuting Attorney for Lake County, by and through Richard J. Perez, Assistant Prosecuting Attorney, and gives notice that the State of Ohio will appeal the judgment of this Court rendered July 19, 1978, to the Supreme Court of the United States, pursuant to 28 U.S.C., Section 1257(3).

Respectfully submitted,

JOHN E. SHOOP
Prosecuting Attorney

/s/ RICHARD J. PEREZ
Assistant Prosecuting Attorney
Lake County Court House
Painesville, Ohio 44077
Telephone: 352-6281, Ext. 281

PROOF OF SERVICE

A copy of the foregoing Notice of Appeal was sent by regular U.S. mail, postage prepaid, to counsel for the defendant, Marvin R. Plasco, Esq., 35100 Euclid Avenue, Willoughby, Ohio 44094, this 13th day of September, 1978.

/s/ RICHARD J. PEREZ

Assistant Prosecuting Attorney

Supreme Court of the United States

October Term, 1978

No. 78-756

STATE OF OHIO,
Petitioner,

vs.

HERSCHEL ROBERTS,
Respondent.

SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

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No. 78-756

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Petitioner,
vs.
HERSCHEL ROBERTS,
Respondent.

SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

ARGUMENT

This supplemental brief has been prepared to bring to the attention of this court additional authority in support of the granting of a writ to review the decision of the Ohio Supreme Court in this case. The authority presented herein was not available when the petition for a writ of certiorari was filed on October 17, 1978.

On January 19, 1979, Chief Judge David S. Porter of the United States District Court for the Southern District

of Ohio filed an opinion, order, and judgment dismissing a petition for a writ of habeas corpus sought on precisely the same grounds that respondent herein has so far successfully asserted in his appeals.

The opinion, order, and judgment in *Glenn v. Dallman*, No. C-1-78-289 (D.C., S.D. Ohio, January 19, 1979) are set forth in full in the Appendix. The facts in *Glenn* are nearly identical to those herein. Witness Mevilin Rogers testified for the prosecution[1] at Glenn's preliminary hearing in a manner which inculpated Glenn. She was cross examined. She then moved somewhere—perhaps California—and could not be located. By the time the case came on for trial (it had been delayed for some time because of Glenn's failure to appear), Ms. Rogers could not be located. Her preliminary hearing testimony was then introduced at trial via a transcript.

In his petition for habeas corpus, Glenn, like Roberts in his appeals, alleged denial of Sixth Amendment right of confrontation by such use of the preliminary hearing testimony.

Judge Porter concluded, as did the Ohio Supreme Court in *Roberts*, that a showing that the witness' whereabouts were unknown was sufficient to show the witness' unavailability.

But Judge Porter, relying upon *Havey v. Kropp*, 458 F.2d 1054 (6th Cir., 1972), reluctantly concluded that he was in error in his previous determination that "the

1. This is the only factual difference between *Glenn* and *Roberts*. In *Roberts*, the witness who later proved to be unavailable was called by the *defense* at the preliminary hearing, and surprised the defense by inculpating Roberts. Despite such surprise, respondent did not attempt to have her declared a hostile witness and proceed to cross examine, although he had every opportunity to do so. See Petition, at 8, note 2.

limited nature of cross examination conducted at preliminary hearings generally including the lack of motive on the part of defense counsel to develop the testimony" denied Glenn the right of confrontation if such testimony was used at trial.[2] In so reversing himself, Judge Porter noted the Ohio Supreme Court's decision *contra* in *Roberts* and his own personal disagreement with *Havey*, but concluded nevertheless that the federal right of confrontation was not denied in circumstances nearly identical with the facts herein.

Thus, it cannot reasonably be disputed that the Ohio Supreme Court erred in finding a denial of federal rights in its decision herein. It cannot be reasonably disputed that the Ohio Supreme Court, by ignoring the holdings of this court as set forth in the Petition, has thus decided a federal question of substance in a way probably not in accordance with the applicable decisions of this court, and sound discretion should be exercised to grant certiorari herein.

Respectfully submitted,

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2. See Petition, at 13, note 7.

APPENDIX

Opinion of the U. S. District Court in Glenn v. Dallman

No: C-1-78-289

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

PRESTON GLENN,
Petitioner,

vs.

WILLIAM DALLMAN, SUPT.,
Respondent.

OPINION

(Filed January 19, 1979)

PORTER, *C.J.*:

This is a habeas corpus case with a somewhat complex history. A recitation of the pertinent background facts will be found in our two prior Opinions (doc. 12, 16). The issue in this case is whether the admission of the preliminary hearing testimony of Mevilin Rogers in petitioner's state trial for aggravated burglary and grand theft violated petitioner's Sixth Amendment rights to confront and cross-examine. In our first opinion, we concluded that petitioner's claims were without merit and ordered the petition dismissed (doc. 12, 13). Respondent then moved to alter or amend that judgment with respect to the reasons given for dismissal of petitioner's first claim pursuant to Fed. R. Civ. Pro. 59(e) on the basis that it was

clearly erroneous as a matter of law (doc. 15). In a subsequent Opinion, we concluded that a hearing was necessary on the issue of the unavailability of the witness Mevilin Rogers (doc. 16, 17). This hearing was held on November 20, 1978. Pursuant to Fed. R. Civ. Pro. 52(a), the Court hereby makes the following findings of fact and conclusions of law.

The missing witness in this case, Mevilin Rogers, was a life-long resident of Columbus, Ohio, and apparently still has parents and a sister living there. At the time of the burglary, she had been living at the home of Melvin Clark (which was next door to the burgled residence) for about a month. Clark testified at the hearing that he had known her for approximately twelve years because she was a friend of his ex-wife. Mevilin Rogers had previously lived on the East side of Columbus (Clark thought it might be on Fairborn Street), and had worked at the Welfare Department but, a month prior to the robbery, she had sold her household goods and moved into his house. This move was apparently in preparation for her departure for Los Angeles, California.

Clark (who was also a witness in the state trial) testified that, although he knew of Ms. Rogers' parents and sister, he did not know where to contact them or where they lived. He admitted on cross-examination, however, that he knew that Mevilin's mother was named Marcella and that she worked at the John Scales Co. in Columbus. He also testified that Mevilin had never been married ("so far as he knew"), and she had "quite a few friends," although none apparently visited her at Clark's house. Finally, he testified that, two weeks following the preliminary hearing in *State v. Glenn*, Mevilin left for Los Angeles and left no forwarding address, either with him or with the Post Office. Clark did not know whether

she ever made it to California and, to the present day, he still does not know "where she was at" (Testimony of Melvin Clark).

The other witness presented by the State was Donald L. Searles, a Columbus policeman, who had been the investigating detective in *State v. Glenn*. Searles has been a policeman for 13 1/2 years, including six and one-half years as a detective. Searles testified that, following the burglary, he interviewed Melvin Clark and Mevilin Rogers at the Clark residence (either that same day or the next day). At that time he showed them a series of pictures from which both Clark and Rogers separately identified petitioner (*see also* trial Tr. 6-7, 23-28, 32-42; preliminary hearing Tr. 15-16; 20-22). Both Clark and Rogers then testified at the preliminary hearing and identified petitioner (preliminary hearing Tr. 11-12, 18-19). Searles also testified that, because petitioner's state trial had been assigned "two or three times" (due to petitioner's repeated failure to appear), he attempted to locate Mevilin Rogers several times. Searles testified that he checked with the Columbus Post Office and found that Ms. Rogers had left no forwarding address. He also talked to Clark about her whereabouts and Clark told him she had left for California. On cross-examination, Searles also stated that he checked with other neighbors and they did not know where she had gone. Although Searles testified at the hearing that he did not ask Clark about her relatives, his prior testimony at the State trial indicates that he did ask Clark about relatives and Clark told him "he knows of no other relatives" (trial Tr. 200). When asked about his reply to Judge Shoemaker that he had "not [done] much, really" to find Mevilin Rogers, Detective Searles stated that he meant that there wasn't much more he felt he could do to find her. Searles apologized for not being more specific in his answers but he is no longer on robbery detail and

he cleared out his desk prior to being subpoenaed in this case. Searles basically stated that he relied on what Melvin Clark told him since he was unable to locate anyone else who knew Mevilin Rogers (Testimony of Detective Donald Searles).

Based upon this evidence and the facts recited in our prior Opinions, we think petitioner's Sixth Amendment claim is without merit. Under the applicable law, there are two prerequisites to the introduction of the prior recorded testimony of the absent witness: 1) the witness' "unavailability" at trial which includes a "good faith effort" by the prosecutorial authorities to obtain the witness' presence; and 2) whether there are sufficient "indicia of reliability" to afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement which includes the adequacy of the cross-examination opportunity afforded at either the prior hearing or the trial itself. *Glenn v. Dallman*, No. C-1-78-289 (S.D. Ohio 1978) slip. op. at 6. We think our prior conclusions concerning the application of this test to the facts of this case were in error.

First, we conclude that a "good faith" effort was made to find Mevilin Rogers. From the testimony, it appears that Detective Searles discussed Ms. Rogers' whereabouts with Melvin Clark, the neighbors in the vicinity and that he checked several times with the Post Office for a forwarding address. We also think it likely that Detective Searles asked Melvin Clark about relations and was either told that Clark knew of no other relations or was told that Clark "didn't know how to contact them."[1] The effect in either case, we think, was the same. Detective Searles followed up what leads he had to Ms. Rogers' whereabouts and learned, from the one individual in a position to know,

1. As Clark stated, he "couldn't have contacted Mevilin's sister if he wanted to."

that she had gone to an undetermined destination in California with no forwarding address. As Clark testified, he still does not know whether Ms. Rogers ever made it to California. Thus, "the prosecution did not definitely know that [the missing witness] was in California and they did not have a specific address for her." *Eastham v. Johnson*, 338 F. Supp. 1278 (E.D. Mich. 1972). The facts of this case are much closer to the facts of *Eastham* than we realized and we think the result ought to be the same. 338 F. Supp. at 1281.

With respect to the second prong of this test, it appears this Court was in error. In our prior Opinion, we noted the limited nature of defense counsel's cross-examination at the preliminary hearing and held that sufficient "indicia of reliability" could not be present where defense counsel had the opportunity but did not have a similar motive to develop the testimony. *See Glenn v. Dallman*, No. C-1-78-289 (S.D. Ohio Aug. 8, 1978); slip. op. at 7-9. The Sixth Circuit has rejected such a view. *Havey v. Kropp*, 458 F. 2d 1054 (6th Cir. 1972).

In *Havey*, the Sixth Circuit was presented with this issue under a Michigan statute which is, in all material respects, identical with the statute involved herein. *Compare* O.R.C. § 2945.49 *with* 458 F. 2d at 1056. The Sixth Circuit first noted the limited nature of the cross-examination conducted at preliminary hearings generally including the lack of motive on the part of defense counsel to develop the testimony:

> Whether the formal right of cross-examination at a preliminary hearing is precisely the same as that to cross-examination at trial is open to doubt. In practice considerations of trial philosophy and tactics generally may militate against more than a perfunctory cross-examination, if that, and it further appears that cross-

examination at such hearings varies widely in different jurisdictions. It must also be borne in mind that the issues at a preliminary hearing and at trial are substantially different, since while at the latter the issue is the guilt or innocence of the accused, the former is concerned only with whether an offense has been committed and whether probable cause exists to hold the accused for trial.

. . .

[The District Judge conducted an evidentiary hearing on the single issue of] the general practice in the conducting of preliminary hearings in the jurisdictions of and near that in which appellant's trial was conducted. Included in the evidence received at hearing was, by stipulation, an affidavit of an expert in the professional and geographical areas. That affidavit stated that it is the usual practice of defense attorneys not to reveal their case and not to cross-examine further where such examination cannot result in dismissal of the charge because too much other evidence of probable cause exists. It is further apparent that as a trial tactic cross-examination at this early stage of the procedure might well be considered harmful to a defendant by alienating the witness, by polarizing his views and by preparing him to offer even more damaging testimony at trial. (458 F. 2d at 1056)

The Sixth Circuit, however, rejected the argument based on such reasoning, in the following language:

> On the basis of such factors, were it not for existence of an applicable Michigan statute, it might be difficult to conclude that appellant had not been denied the right of confrontation. In the present circumstance, however, neither was the defendant nor are we now considering the issue in the absence of an applicable statutory provision. . . .

> This statute was in effect at the time of the preliminary hearing and, therefore, when appellant by his counsel decided to conduct only what he considered to be a limited cross-examination, he did so at his own risk. The opportunity for unlimited cross-examination existed, and since he was chargeable with knowledge of the statute and his rights under it, he cannot now be heard to complain because by his own choice he did not fully cross-examine. (458 F. 2d at 1056-57) (Footnote omitted.)

Although we realize that the courts of the State of Ohio have taken a contrary view concerning their own statute (*see State v. Roberts,* 55 Ohio St. 2d 191 (1978), *petition for cert. filed,* 47 U.S.L.W. 3348, 3427 (1978)), the question before us is what the Constitution requires. A state court's interpretation of the relevant constitutional law is not binding upon us. *Davis v. Heyd,* 479 F. 2d 446, 449 (5th Cir. 1973). The Sixth Circuit, in *Havey,* has taken the position that the Constitution requires no more than what occurred in this case. While we may disagree with that decision, it is not the function of a lower court "to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time . . .; on the contrary, . . . the measure of [a district court's] duty is to define, as best it can, what would be the event of an appeal in the case before it." *Spector Motor Serv. v. Walsh,* 139 F. 2d 809, 823 (2d Cir. 1943) (L. Hand, *J.,* dissenting). *Havey* plainly indicates the result on appeal on the issue herein. Until it is overtaken by subsequent events, we have no choice but to follow it.

Respondent requested at the hearing that we reconsider our decision in the *Wainwright v. Sykes* "waiver" issue. *Glenn v. Dallman,* No. C-1-78-289 (S.D. Ohio 1978) (doc. 16, at 3-4). We have reconsidered our earlier ruling and concluded that we were correct.

Thus, we conclude that petitioner is not prevented by an "adequate independent state ground" from presenting his Sixth Amendment claim herein but that petitioner's claim is without merit. The petition, therefore, should be dismissed.

/s/ DAVID S. PORTER
Chief Judge, United States District Court

Judgment Entry of the U. S. District Court in Glenn v. Dallman

No. C-1-78-289

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

PRESTON GLENN

vs.

WILLIAM DALLMAN, SUPT.

JUDGMENT

This action came on for (hearing) before the Court, Honorable David S. Porter, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that petitioner's Petition for Writ of Habeas Corpus should be and is hereby dismissed.

Dated at Cincinnati, Ohio, this 19th day of January, 1979.

JOHN D. LYTER
Clerk of Court
/s/ ANNE CATANZARO
Deputy Clerk

Order of the U. S. District Court in Glenn v. Dallman

No. C-1-78-289

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

PRESTON GLENN,
Petitioner,

vs.

WILLIAM DALLMAN, SUPT.,
Respondent.

ORDER

(Filed January 19, 1979)

This is a habeas corpus case with a somewhat complex history. A recitation of the pertinent background facts will be found in our two prior Opinions (doc. 12, 16). A hearing was held on the issue of the "unavailability" of the witness Mevilin Rogers for petitioner's state trial for aggravated burglary and grand theft by this Court on November 20, 1978. Based on the findings of fact and conclusions of law stated herein, we conclude that petitioner's sixth amendment claim for relief is without merit. Fed. R. Civ. Pro. 52(a). The petition, therefore, must be dismissed.

SO ORDERED.

/s/ DAVID S. PORTER
Chief Judge, United States District Court

APPENDIX

In The

Supreme Court of the United States

October Term, 1978

No. 78-756

STATE OF OHIO,
Petitioner,

vs.

HERSCHEL ROBERTS,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petition for Certiorari Filed October 17, 1978
Certiorari Granted April 16 ,1979

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DOCKET ENTRIES

A. Opinion, Judgment, and Mandate of the Supreme Court of Ohio.

Note: The opinion, judgment, and mandate of the Supreme Court of Ohio are printed in the Appendix to the Petition for Certiorari, at pages 15-28 of the petition.

B. Opinion and Judgment of the Court of Appeals for Lake County, Ohio.

OPINION OF THE COURT OF APPEALS FOR LAKE COUNTY

(Dated February 14, 1977)

Case No. 5-297

COURT OF APPEALS OF OHIO
ELEVENTH DISTRICT,
COUNTY OF LAKE

STATE OF OHIO,
Appellee,

vs.

HERSCHEL ROBERTS,
Appellant.

ANNOUNCEMENT OF DECISION

This cause came on to be heard upon the record in the Trial Court, and was briefed and argued by counsel for the parties. Upon consideration whereof, this Court certifies that in its opinion substantial justice has not been

done the party complaining, as shown by the record of the proceedings and judgment under review, and the judgment of the Trial Court is reversed. Each assignment of error was reviewed and, upon review the following disposition made:

The appellant, Herschel Roberts, was arrested by the Mentor Police Department on January 7, 1975, on a charge of Forgery. (Later a charge of Receiving and Concealing Stolen Property was added.) After numerous continuances, the case was tried before a jury on March 4, 1976. At that time, the appellant was found guilty on both counts.

During the course of the trial and over appellant's objections, the trial court permitted the introduction to evidence of a prior recorded transcript from an earlier preliminary hearing.

This cause is before the Court of Appeals as of right from the judgment of conviction and sentence below.

The appellant assigned two errors. The first is that the trial court violated appellant's Sixth Amendment rights to confrontation and deprived the jury of their right to study the witness on the stand by admitting into evidence a transcript of a prior preliminary hearing in which an absent witness testified.

The constitutional question assigned here was timely and properly raised in the trial court. The pertinent portion of Amendment VI is as follows: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

The State of Ohio, at R. C. 2945.49 and at Criminal Rule 15, gives some sanction to the usage of testimony taken at a preliminary hearing at which the defendant is present to be used at trial when (1) the witness giving such testimony is dead at time of trial, (2) has become

incapacitated to testify, or (3) cannot for any reason be produced at the trial.

Prior recorded testimony since the decision of Mattox v. U. S., 156 U. S. 237 (1895) has been admissible in appropriate cases until Barber v. Page, 390 U. S. 719 (1968). In Barber supra, the petitioner had been convicted on the basis of testimony introduced through a transcript of a preliminary hearing. The witness in question was incarcerated in a federal prison. The Supreme Court held that the state could not, consistent with constitutional requirements, use that transcript in lieu of the witness unless (1) the witness was shown to be actually unavailable to testify at trial, and (2) the witness had been adequately confronted and cross-examined at the prior hearing. The Supreme Court concluded neither condition had been met in that the State had failed to make a good faith effort to secure the presence of the witness at trial and hence it could not be said the witness was unavailable and further, that the preliminary hearing did not afford adequate pre-trial opportunity for confrontation and cross-examination.

With that background, let us look at the facts of this case. The absent witness whose testimony was sought to be used by the State was the defendant's witness at the preliminary hearing. It doesn't matter that his testimony was not favorable to the defendant, as that information, in this case, is after the fact and should never have been learned by this Court. What is important is that the Sixth Amendment says the accused shall enjoy the right to be confronted with the witnesses against him. This right of confrontation of the absent witness, as a witness against him, did not occur at trial.

Second, under the applicable statute, 2945.49 only the third reason noted above is appropriate, and that is that

the witness cannot for any reason be produced at trial. In view of the Supreme Court's admonition in Barber, it would appear necessary for the prosecution to show that the witness was actually unavailable to testify at trial. We do not have that clear-cut unavailability of the witness demonstrated here. The Prosecutor, in his brief, said, "The specific facts show that Anita Isaacs was not available at the time of trial. First, there was the fact that the State did subpoena her on numerous occasions but could not obtain service. Second, there is the testimony of her mother, Amy Isaacs." Amy Isaacs recounted, upon voir dire examination, that her daughter had been absent from the State of Ohio for over thirteen months, although she had talked with her twice in the past summer (R. 198). In checking on the return of the subpoenas in the record, all show, contrary to the Prosecutor's statement, that service on Amy Isaacs was made. The matter had been set for hearing on several occasions, and five subpoenas for Anita Isaacs, all to the same address, were issued. The first two show that returns were made on November 3 and 4, 1975, respectively. A third, showing return of service on December 10, 1975, carried the advice on the subpoena to "please call before appearing" on date of trial. The fourth and fifth returns, showing service on February 3, 1976, and February 25, 1976, carry the same instructions. The address of the residence served, if there was residence service as opposed to personal service, was that of the parents of Anita Isaacs, according to Mr. Isaacs' testimony concerning his home address. In addition to the issuance of five subpoenas either by personal or residence service with instructions to call before appearing we have the testimony of Amy Isaacs that she had talked to her daughter in the preceding thirteen months as well as with her daughter's social worker in San Francisco, California.

In contrast to that information, we have no witness from the prosecution to testify (1) that the subpoenaed witness never called, (2) that the subpoenas could never be personally delivered, (3) that no one on behalf of the State could determine Anita's whereabouts, (4) that anyone had exhausted contact with the San Francisco social worker, and (5) neither of the parents Isaacs stated that anyone had left residence service of subpoena for Anita at their residence. In short, it was not clearly shown to the Court that the witness was actually unavailable to testify at trial as required in Barber. Had the State demonstrated that its subpoenas were never actually served on the witness and that they were unable to make contact in any way with the witness, there would have been a showing of a good faith effort to secure the presence of the witness at trial. We do not think the State, in the voir dire requested by the defendant, established the actual unavailability of the witness, Anita. On the contrary, the prosecution, at least until time of trial, surely was in frequent touch with the Isaacs, the victims of the forged check and owners of the stolen property. If Anita was truly unavailable, the prosecution would or should have learned this from the Isaacs every time she was subpoenaed at their residence. Until the Isaacs' voir dire, requested by the defense, the State had done nothing, absolutely nothing, to show the Court that Anita would be absent because of unavailability, and they showed no effort having been made to seek out her whereabouts for purpose of trial. In the cross-examination of the State's witnesses, up until the voir dire examination of Mrs. Isaacs, it is apparent from testimony at pages 94, 121, 126, 172, 190, and 191, that Mrs. Isaacs' daughter Anita may have been rather closely linked to the defendant in his criminal involvements. We make this commentary only to show

that Mrs. Isaacs' comments about Anita's whereabouts at time of trial may have been less than candid, and hence possibly lacking in the truth necessary for the State to show the absent witness's unavailability. We do not think the State met the statutory test of proof the witness could not be produced at trial for any reason when the guidelines under Barber require a "good faith effort" on the part of the State to secure the presence of the witness.

We do not think the testimony of defendant's own witness taken at preliminary hearing falls within the meaning of the Sixth Amendment when it says the accused shall enjoy the right to be confronted with the witnesses against him (at no hearing was the absent witness declared to be a hostile witness). For the reasons indicated, we find this assignment of error well taken.

* * * * **

Consistent with our reasoning as it applied to Assignment of Error No. 1, this cause is reversed and remanded to the trial court for further proceedings consistent therewith and in accordance with law.

Judgment reversed.

EDWIN T. HOFSTETTER
Judge

COOK, *P.J.*,

O'NEILL, *J.*, concur

(JOSEPH E. O'NEILL, *Judge*, Seventh District, Sitting by Assignment in Eleventh District)

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*A portion of this Opinion, having no bearing whatever on the issues presented, has been omitted.

JOURNAL ENTRY OF THE COURT OF APPEALS FOR LAKE COUNTY

(Filed March 14, 1977)

Case No. 5-297

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO

THE STATE OF OHIO,
Plaintiff-Appellee,

vs.

HERSCHEL ROBERTS,
Defendant-Appellant.

JOURNAL ENTRY

This cause came on to be heard upon the appeal of Appellant, Herschel Roberts, briefs, transcript of the docket, the record, original papers and pleadings, journal entries and oral arguments submitted by counsel to this Court.

On consideration, the Court finds Assignment of Error No. 1 well taken, that there is error manifest upon the face of the record to the prejudice of the Appellant, in that the transcript of a prior preliminary hearing in which an absent witness testified was admitted into evidence at the trial over Appellant's objections in violation of his Sixth Amendment rights.

It is therefore Adjudged and Ordered that the judgment and sentence of the Court of Common Pleas, Lake County, Ohio, dated March 9, 1976, be and the same is

hereby reversed and vacated, and the cause be remanded to the Court of Common Pleas, Lake County, Ohio, for further proceedings according to law, and it appearing that the Appellant, Herschel Roberts, has been committed to Chillicothe Correctional Institute, in Chillicothe, Ohio, on such conviction and sentence, it is ordered that the Clerk of this Court shall certify the reversal of the judgment and conviction to the warden of the Chillicothe Correction Institute, in Chillicothe, Ohio.

/s/ ROBERT E. COOK
Judge

/s/ EDWIN E. HOFSTETTER
Judge

(JOSEPH E. O'NEILL, *Judge*, Seventh District, Sitting by Assignment)

EXCERPTS OF TRANSCRIPT OF TESTIMONY

[194] VOIR DIRE EXAMINATION OF AMY ISAACS

By Mr. Plasco:

Q. Mrs. Isaacs, you're still under oath. A. Yes.

Q. When was the last time you saw your daughter, Anita? A. Oh, the end of January.

Q. Of this year? A. Of '75.

Q. 1975? A. Yes.

Q. So, it's been thirteen (13) months since you've seen her? A. Yes.

Q. Presently, what state is she residing in, if you know? A. I don't know.

Q. Isn't it true that in January of '75 she went to California, or thereabouts? A. She went out to Tucson.

Q. To Tucson? I think you indicated to the jury that you and she had been fairly close? A. Yes.

[195] Q. Is she still single, if you know? A. Yes.

Q. And, you've had no communication between you and she since that time? A. We talked to her last Summer. We didn't know where she was, she was traveling. We don't know where she called from.

Q. She called you? A. Yes.

Q. Last Summer being the Summer of '75? A. Yes.

Q. And, since the Summer of '75, you've received no postcards, no communication whatsoever from her? A. That's correct.

Q. Have any of the other siblings, your other two daughters, received any communication from her, if you know? A. No. I know that they have not.

Q. If there would be—which we hope not—an emergency, is there any way you can reach her? A. Not that I know of.

Q. Are there any relatives that you know, that have any way of reaching her? A. No. She hasn't contacted anybody.

Q. Do you know why she hasn't communicated with you? A. I suspect that she wants to make her own way, and forget [196] all the unpleasantness that happened here, and prove something to herself and to us, and to think about her future and forget about the past.

Q. Were you present when she testified at a preliminary hearing in the Mentor Municipal Court, in January, 1975? A. Yes.

Q. Did she give you any impression that she was not telling the truth on that particular occasion? A. No. I believed her, and I still believe her.

Q. If you know, was she on any kind of drugs at that time when she testified? A. I don't think she was.

Mr. Plasco: Nothing further.

VOIR DIRE EXAMINATION OF AMY ISAACS

By Mr. Perez:

Q. Did you ever communicate with your daughter through a social worker in California, or Tucson, or somewhere? A. I did have occasion to talk to a social worker in Los Angeles earlier in the year, but I can't remember the date.

Q. Of what year? A. In '75.

Q. And, whose social worker was it? A. It was a social worker that Anita was talking to.

Q. And, did the social worker call you, or did you call [197] the social worker? A. Can we go back a little bit?

Q. Sure. A. Where did you say the social worker was?

Q. I am basing this on something—I talked to you, if you recall, one time around November, I believe, I talked to you on the telephone; do you recall that? A. Yes.

Q. And, at that time do you recall telling me that you had spoken to your daughter's social worker? A. Since she'd been away?

Q. Right. A. Yes, yes, that's correct; and I had called the social worker.

Q. And, where was this social worker at? A. San Francisco.

Q. And, you called her? A. Yes. It was a man.

Q. You called him? And, how did you happen to locate the social worker? A. We had received a form from the San Francisco County telling us that she had applied for welfare, and asking, you know, a form for us to fill out; and, it had the office address on it, so I used that address to locate the party that was dealing or was working with Anita.

[198] Q. And, did that party tell you whether or not she was in California? A. Yes.

Q. And, when was that, approximately? Within a month, if you know. A. I would say April or May of '75.

Q. And, you did not talk to your daughter on that day? A. Yes, I did.

Q. Oh, you talked to your daughter? And, is that the last time you talked to her? A. No, she called us again later in the Summer. We don't know where she called from.

Q. And, for what reason did she call you? A. Just to let us know that she was all right.

Q. And, did she indicate to you at that time that she was in Ohio or out of Ohio? A. Out of Ohio.

Q. Did she indicate to you at any time during the last two conversations with you that if she were in the State of Ohio she would contact you? A. No.

Q. Do you know of anybody who knows where she is? A. No, I do not.

Q. Do you know of anybody who would be able to get in contact with her? [199] A. I knew the name of a person that she knew in Tucson, but I don't have any address for that person and I wouldn't know how to find them.

Q. Does your husband have any other information that you do not have? A. No.

Q. Did you discuss this with your husband? A. Yes; we were trying to refresh ourselves about the sequence of events.

Mr. Perez: I have no further questions, your Honor.

Mr. Plasco: Nothing further.

The Court: Thank you, Mrs. Isaacs.

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[VOIR DIRE ARGUMENT REGARDING THE ADMISSIBILITY OF THE TRANSCRIBED TESTIMONY OF ANITA ISAACS]

[273] Mr. Plasco: Your Honor, at this time the defense would rest.

The Court: I assume you have some rebuttal?

Mr. Perez: Yes, your Honor. The State has a transcript, certified, of the preliminary hearing held in this matter on January 10, 1975, at which time Anita Isaacs, who is unavailable as a witness for the present hearing, did testify.

* * * * *

[274] The defendant was present at that hearing on January 10th, he witnessed that I have attempted to locate, I have subpoenaed, there has been a voir dire of the witness' parents and they have not been able to locate her for over a year. The witness, Anita Isaacs, was called by the defendant's attorney at that time, Richard Swain, and was called on behalf of the defendant. There has been no cross examination by the State. However, the State would like to have this transcript admitted by way of having a Miss Jane Carlisle take the stand, instead of Anita Isaacs, at which time I will ask Jane the questions and she will read from the transcript.

The Court: Are you acquainted with the testimony about to be heard?

Mr. Plasco: Your Honor, for the record, I was furnished the day before trial with a copy of a transcript that allegedly took place at a preliminary hearing in the Mentor Municipal Court on January 10, 1975. I have a number of objections to the admissibility of said transcript into evidence, or being read to the jury in the present case at bar.

The Court: Proceed.

[275] Mr. Plasco: Thank you, your Honor. To begin with, I'm objecting to the constitutionality of

Ohio Revised Code Section 2945.49. The general purpose of a preliminary hearing is a discovery tool where the defense attorney attempts to get information out so he can best represent his client. It is not to eliminate hearsay. Many times hearsay evidence is intentionally left in so the defense attorney can get more information.

The Prosecutor has alleged that Mr. Richard Swain, then defense attorney, called Anita Isaacs as his witness. There was no discussion prior to her testimony, the defense attorney did not know what she was going to state, and she testified with her parents present in the courtroom.

We contend that if she did testify, she was perjuring herself and did not tell the truth in the matter. There was no cross examination by the Prosecutor. We don't refute the issue that Mr. Swain is an excellent attorney, presently Judge, and that he did represent Mr. Roberts at that hearing.

[276] Another point that I want to call to the Court's attention, too, is that I don't believe that in the case here at Court Mr. Perez laid the proper predicate for bringing into evidence the transcript in question. We have one witness, Mrs. Isaacs, who testified that her daughter is no longer available and outside the jurisdiction. We have no proof at this point that her daughter did testify, that she was under oath, and it was regarding the same matter.

The Court: Well, what does the transcript say?

Mr. Plasco: Well, it's her testimony from the hearing, yes; plus, it would have to show that it's an exact copy of her testimony. The defendant is being denied his right to meet his accusers or have an opportunity to cross examine. We cannot cross examine the transcript of an earlier hearing that was over a year ago.

The Court: Well, it's rather difficult to cross examine your own witness in any event, isn't it?

Mr. Plasco: Yes, sir. She was at best a hostile witness because of her parents being in the room.

[277] The Court: Well, it takes more than that to show hostility.

Mr. Plasco: I further object, your Honor, on one more ground. This is rebuttal testimony, it's being offered into evidence as rebuttal testimony, and I believe this should have been offered into evidence during the Prosecutor's case in chief rather than rebuttal. It is not something that Mr. Roberts has said, it's not any prior recorded testimony of him, it's the recorded testimony of someone else. I have a citation on that—well, I don't have it present.

For these reasons, we would strongly object to the admissibility of the transcript as being prejudicial to Mr. Roberts' rights in violation of the U.S. Constitution—confrontation of witnesses, allowing hearsay testimony into evidence. Thank you.

The Court: Well, the certification states it is an accurate and true transcript of the preliminary hearing at the Mentor Municipal Court, of the testimony of Anita Isaacs.

Mr. Plasco: But, it goes beyond the rebuttal of what Mr. Roberts said, it goes into new areas which have not been discussed in the [278] case at bar.

The Court: That's the danger that you take when you conduct a fishing expedition in a preliminary, instead of going by the new rules providing for discovery. Proceed, Mr. Perez?

Mr. Perez: Proceed with argument, or proceed with—

The Court: With your transcript.

Mr. Perez: I would like to make one statement on the record, however. This transcript, although received by defendant's counsel in this particular form the day before trial, a similar transcript was provided the defendant's attorney well over a month before trial which was substantially similar to this, it was not in its completed form and had not been certified. Certain changes were made in the final draft and it was finally given to defendant's attorney.

Also, it was the representative of the defendant who did put this Anita Isaacs on the stand originally. I'd just like to point that out.

The Court: Fine. Would you bring in the jury.

Mr. Plasco: Your Honor, one thing for [279] the record, I also object because the person who certified it is not present in the Court today to testify these facts to be an authenticated copy.

The Court: That's why they certify it.

[280] The Court: Members of the jury, at this time I'm advising you that the defendant has completed his case and has rested on the record.

The next witness you hear will be called on behalf of the State, in rebuttal. However, the witness herself is missing. She did give prior testimony at another hearing, concerning this matter, in the Mentor Municipal Court, which earlier was duly recorded and has been typed, so you will hear it by way of a transcript of proceedings from that Court, with Mr. Perez asking the questions and –who is acting as the witness?

Mr. Perez: Jane Carlisle.

The Court: Jane Carlisle will be on the witness stand, but the witness actually is Anita Isaacs.

Mr. Perez: This is a transcript of the testimony of Anita Isaacs taken at a preliminary hearing, on January 10, 1975, before the Honorable Alfred E. Dahling, Judge of said Court.

[281] THEREUPON, the prior testimony of ANITA ISAACS was read into the record, as follows:

"DIRECT EXAMINATION OF ANITA ISAACS

By Richard Swain:

Q. Will you state your full name to the Court, please? A. Anita Isaacs.

Q. And, where do you live, Anita? A. 2493 North Oak, in Cleveland Heights.

Q. And, how long have you lived there? A. Since last May, the end of last May.

Q. And, are you employed? A. No.

Q. Have you been employed in the last couple months? A. I just got out of school. I was in a dental technician program that finished at the end of November.

Q. Do you have anybody that is living with you at the apartment? A. No, I reside there alone, which was part of the contract with my landlord.

Q. You've had no friends, girl friends or boy friends, living there? A. Well, I've had people stay there, but I never considered them sharing the place with me. I mean, I regarded these people as guests; but I lived alone and had my name on the mailbox.

[282] Q. Now, do you know Herschel Roberts? A. Yes, I do.

Q. And, when did you first meet Mr. Roberts? A. It was about the beginning of last Summer.

Q. Back in June or July, then, is that correct, of '74? A. Yes, that is right.

Q. And, how did you happen to meet him? A. I was in a school program with a woman, and her younger sister is this man's girl friend, and so through her I became friends with my classmate's younger sister, and through her I met this man.

Q. Now, did you see him only occasionally from June or July of 1974 until the present time? A. Yes. I never kept company with him.

Q. I see. Now, isn't it a fact that he has been staying at your place for the last couple, three weeks? A. Yes. Before my parents went away, I also went away and I gave the girl, his girl friend, the keys to my apartment because she was living at home, and I said "If the two of you want to stay here while I'm away fine." And, when I got back he said that he was having trouble finding a place to stay, and I said that if you want to continue, you know, and he said it would just be for a couple of days; so, when he was there—can I go on?

[283] Q. Go ahead. A. Well, when he was there, my boy friend would come and pick me up, wherever I was, and take me to his house; and I just never spent any time in my apartment with this man.

Q. O.K. Now, when did he and his girl friend start staying in your apartment? A. It was from the 24th; now, I was away so I don't know how much time they made use of my apartment.

Q. Well, when did you go away? A. I gave the girl, I gave Katy the key on the 23rd and I went away on the 24th.

Q. Of what month? A. Of December, '74; and I came back December 30, and I never got the key back.

Q. O.K. Now, is it to your knowledge, then, that this Mr. Roberts has been staying at your apartment until the present time, from December 30th? A. Yes.

Q. O.K. And, do you know whether or not his girl friend was staying there at the same time? A. She spent time there, she had things there, and how much time they spent together there I don't know, because when he was there I wouldn't be there; I mean, I would have come home to pick up some clothes or to, **[284]** you

know, but I just would not spend any time there when he was there.

Q. Now, since December 30th have you spent any nights in your apartment? A. No, I haven't.

Q. Now, where have you spent the nights during this time, then? A. 2951 East Overlook.

Q. And, that is also in Cleveland Heights? A. Yes, it is.

Q. Now, have you ever had occasion to use either your father or mother's credit cards? A. Yes, I have.

Q. And, do you recall approximately when the last time was that you had the opportunity to use them? A. It was many, many months ago because I have been making a very—you can talk to my social worker— I have been making very conscientious steps to become financially independent of my parents; and, I can't even remember the last time that I had their credit cards except for a gas card, which I have never loaned out.

Q. And, do you have that gas card today? A. No, I don't, I gave it back to my parents, because it was part of the pack of the Sohio cards that were taken, so it is no good any more.

[285] Q. O.K. And, when did you return this card to your parents? A. This morning I gave it to them.

Q. I see. And, this wasn't then in the pack of credit cards, then? A. No. I had it in my purse.

Q. I would like to show you for the purpose of identification State's Exhibit B, and ask you if you have ever seen that before? A. I have never seen this one. I've never seen this.

Q. Would you state what you are seeing? A. Oh. These are my parents' credit cards, and I have never seen the one from" —it's marked inaudible— "and the NAACP, I have never seen that; I have never seen the Automobile Insurance Service Card, I have never seen

the Beston Company charge card, I have never seen the Early American Society card, I have never seen the Automobile Insurance Service and Identification card; there is a customer receipt from Halle's that I have never seen; that is funny, this is an address that I have no idea that—this isn't a name that I know or have any information that I know. I have seen this Halle's card, I've never seen this Winkelman's card; I think this is the same Sohio card that I had, but I never had this one; I don't remember seeing the Gulf **[286]** card. I used to use this, but—inaudible—isn't in Cleveland any more. Hudson's I have never seen, Franklin-Simon I have used, the Stouffer's I have never seen, and the Lord and Taylor's I have never seen.

Q. Now, all of those cards are titled in what, your father's name or your mother's name? A. My father's and my mother's.

Q. And, the first two cards that you looked at, there, who are they titled in? A. In my mother's.

Q. And, who's in the NAACP? A. The NAACP is my mother's, and the Automobile Insurance has my father's initial on it.

Q. I hand you what has been marked for the purpose of identification as State's Exhibit C, and ask you if you have seen that? A. No, I have not.

Q. Not even today? A. Oh, yes, I see it now right there.

Q. You have not seen it prior to me showing you? A. No. I have not.

Q. I hand you what has been marked as State's Exhibit A; state whether or not you have seen this. A. Yes, I remember this, and I remember seeing it in my cabinet in my parents' house.

[287] Q. You have never seen it outside of the cabinet in your parents' house? A. Maybe around our home, but I've never seen it outside of our home before.

Q. You have never seen it in your apartment? A. No, I certainly haven't.

Q. And, you have never seen these credit cards in your apartment since December 30, 1974? A. No, I have not.

Q. Now, since December 24th, isn't it a fact that you have been in your parents' home since that time? A. Yes.

Q. And, do you recall the occasions that you had—" Let me read that again. "Do you recall the occasions that you had you were in there? A. I was there once, Thursday, January 2, to make sure that our neighbors had come to feed the cats, and to see if there were any packages on the steps, and I was there twenty minutes at the most; and I went next door to see the neighbors.

Q. Now, your parents weren't home at that time; isn't that correct? A. That's correct.

Q. Did you notice anything wrong, disturbed, in the house when you were there on January 2nd? [288] A. No. Everything looked in place.

Q. You did not observe any broken door or windows, or anything taken; is that correct? A. That is correct.

Q. Then, did you have somebody with you on January 2nd when you went there? A. No, I came alone.

Q. And, do you recall what time of the day that you were there? A. I was there at 11:30, and—

Q. A.M. or P.M.? A. A.M., probably from a quarter after eleven until twenty of twelve.

Q. Now, did you go over and talk to the neighbors? A. Yes, Mr. Dunbar, Manley Dunbar; and, he gave me two slices of bread because I was going to make lunch and take it to somebody.

Q. Now, since January 2nd, have you been back to the house? A. Yes. I picked up my parents at the

airport Sunday night and I was made aware that there had been a burglary. My boy friend and I drove my parents home, and at that time I saw, you know, that somebody had broken in, I saw everything out of place, and things missing, and drawers opened, and—

Q. Now, is it a fact that you have seen these credit cards [289] since the 23rd of December, and isn't it a fact also that you gave these credit cards to Mr. Roberts? A. This is the first time that I have seen them, period, period. And, except for the ones that I said I had seen, and I never gave him any credit cards.

Q. And, there was never anybody around at any time when you might have discussed anything about credit cards or the purchase of a TV set, is that correct, with the defendant? A. Could you restate that, because I—

Q. Did you ever talk to anybody about buying a color TV set? A. No. I'm not working and I couldn't afford it.

Q. You never talked to Mr. Roberts, here, about buying a color portable TV set that was his? A. No. He brought a TV set over to my apartment when he was staying there, that he was using.

Q. I see. But, you never discussed buying that TV set? A. No, I didn't.

Q. You never gave him credit cards in order to help pay for that TV set? A. To my knowledge, that TV set had been paid for. He brought it in, you know, with him when he came. I never discussed buying a TV set with Mr. Roberts.

Q. Did you have a TV set of your own? [290] A. Yes, I did.

Q. And, what kind of TV set? A. A Twenty-Dollar ($20.00) old model, a floor model, that we got.

Q. That you—inaudible—portable? A. No, it wasn't portable, I mean, it was a standing model that

we had got from a relative of ours, and I had to work up an antenna to it and make it satisfactory.

Q. Did you have an occasion to see Mr. Roberts here on Friday, Saturday, or Sunday of this last weekend? A. I spent that time on Overlook at the address I gave you, and I gave my friend messages. When I would go there, he would not be there; when I wanted to tell him, you know, I thought he was going to be out of there by Saturday, and then he said that he wanted to stay here over the weekend, at which point I left a note saying that I want my privacy, you know, there were things I had to take care of, could you please find somewhere else to stay? And, he was cooperative, he wasn't there after that, to my knowledge, except that when I came back there were things already moved out, so I knew that he was making an attempt to move out of there. And then, the next contact I had with him, he also had a key to my car, and he had permission to use my car over the weekend; and I asked him for my car, **[291]** you know, keys back and I said that I was supposed to start a job on Monday, and so I said I need my car Monday morning; and, he was cooperative in bringing the car back, he parked it, it was there. He returned it.

Q. O.K. But, you didn't talk to him in person either Friday, Saturday, or Sunday of last week? A. No.

Q. Now, the first time that you talked to him in person was what, Monday, when you went to get your car? A. No, I did not even see him then. He just left the car there.

Q. And, the keys? A. Right—no, I had a key. To my knowledge he still has a car key of mine and the front door key to my apartment, the apartment itself. He hasn't given me any keys back. The keys I had given to his girl friend, but the car key I gave to him personally; but I can't remember seeing him personally until I saw him in regards to this.

Q. One more question. Could you give me the name of your boy friend again? A. Joe Zuband.

Q. Do you know whether Joe has met Mr. Roberts or not? A. No, they haven't.

Q. The two girls that you mentioned that were connected **[292]** with your program, or something— A. Camille Cummings? She went to school with me.

Q. Do you know whether she knows the defendant or not? A. I know she does.

Q. I have no more questions."

Mr. Perez: Thank you very much. The State has no further rebuttal witnesses, your Honor.

Thereupon, the state rested.

* * * * *

[ADDITIONAL INSTRUCTIONS TO THE JURY REGARDING THE TRANSCRIBED TESTIMONY OF ANITA ISAACS]

[297] The Court: * * * Now, you are the sole judges of the facts, the credibility of the witnesses, and the weight of the evidence.

To weigh the evidence, you must consider the credibility of the witnesses, including the defendant. You will apply the tests of truthfulness which you apply in your everyday lives.

These tests include the appearance of each witness upon the stand; his manner of testifying; the reasonableness of the testimony; the opportunity he had to see, hear and know the things concerning which he testified; his accuracy of memory; frankness or lack of it; intelligence; interest and bias, if any; together with all the facts and circumstances surrounding the testimony. Applying these tests, you will assign to the testimony of each witness such weight as you deem proper. You are not required to believe the testimony of any witness simply because he or she was under oath. You may believe or disbelieve

all or any part of the testimony of any witness. It is your province to determine what testimony is worthy of belief and what testimony is not worthy of belief.

* * * * *

[298] Some testimony was presented by way of a transcript of testimony which was read to you. This evidence is to be considered in the same light and subject to the same tests that are applied to other witnesses.

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THE OPPOSITION TO THE PETITION

NORMALLY APPEARS AT THIS POINT.

HOWEVER, NO OPPOSITION WAS FILED IN

THIS CASE.

Supreme Court of the United States

October Term, 1978

No. 78-756

STATE OF OHIO,
Petitioner,

vs.

HERSCHEL ROBERTS,
Respondent.

BRIEF OF PETITIONER

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BRIEF OF PETITIONER

OPINIONS BELOW

The opinion and judgment of the court below giving rise to this petition are as follows:

State of Ohio v. Roberts, 55 Ohio St. 2d 191, 378 N.E. 2d 492, 9 Ohio Op. 3d 143 (1978)

Said opinion may be found at page 15 of the petition.

JURISDICTIONAL STATEMENT

The opinion and judgment of the Supreme Court of Ohio herein was rendered July 19, 1978. No motion for a rehearing was filed.

This court has jurisdiction to review this matter upon certiorari pursuant to 28 U.S.C., Section 1257(3), in that the validity of Section 2945.49, Ohio Revised Code, has been drawn into question on the ground that it is repugnant to the Sixth Amendment to the Constitution of the United States.

Certiorari was granted herein on April 16, 1979.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment, Constitution of the United States

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

Section 2945.49, Ohio Revised Code

Testimony taken at an examination or a preliminary hearing at which the defendant is present, or at a former trial of the cause, or taken by deposition at the instance of the defendant or the state, may be used whenever the witness giving such testimony dies, or cannot for any reason be produced at the trial, or whenever the witness has, since giving such testimony, become incapacitated to testify. If such former testimony is contained within a bill of exceptions, or authenticated transcript of such testimony, it shall be proven by the bill of exceptions, or transcript, otherwise by other testimony.

QUESTION PRESENTED FOR REVIEW

Where a witness, called by a criminal defendant at a preliminary hearing, testifies in a manner incriminating the defendant and was not cross-examined although there was opportunity to do so, and that witness is later shown

to be unavailable to testify at the trial of the same defendant on the same charge, does the confrontation clause of the Sixth Amendment to the Constitution of the United States preclude the State's use of the witness' recorded testimony?

STATEMENT OF THE CASE

The facts underlying this case which are germane to this appeal are as follows:

The defendant, Herschel Roberts, was arrested in the City of Mentor, Lake County, Ohio, on January 7, 1975, and charged with forgery. Later, additional charges of receiving and concealing stolen property and possession of heroin were brought.

Shortly after defendant's arrest, a preliminary hearing was held in which witnesses were called both by the State of Ohio and by the defendant. Anita Isaacs, one of the witnesses *called on behalf of the defendant,* testified in such a manner that incriminated the defendant. Counsel for defendant had, but did not exercise, an opportunity to declare her a hostile witness and cross-examine. At the conclusion of said preliminary hearing, the defendant was bound over to the Lake County Common Pleas Court.

After indictment and arraignment, numerous trial dates were set in Common Pleas Court. As a result of continuances all occasioned on the part of the defendant and his leaving the jurisdiction, however, trial was not held until March 4, 1976.

During defendant's March 4, 1976 trial, the State of Ohio offered as evidence, and the Court admitted over defendant's objections, a transcript of Anita Isaacs' preliminary hearing testimony, admissible pursuant to Section

2945.49 of the Ohio Revised Code, the witness Anita Isaacs being an unavailable witness pursuant to said Section.

Prior to the admission of the recorded preliminary hearing testimony of Anita Isaacs, her mother, Amy Isaacs, was questioned outside the hearing of the jury to determine the whereabouts of Anita, the last time Anita had been seen by her mother or father, and whether or not Amy Isaacs had had any communication with her daughter (App. 8-11). Amy Isaacs testified that she had not been in contact with or had word of her daughter for 13 months (App. 8) other than two telephone calls; one received from Anita in which Anita did not indicate her whereabouts but indicated she was not in the State of Ohio (App. 11), and another from a California social worker who indicated that Anita was trying to obtain welfare in California (App. 10). Mrs. Isaacs also testified that neither her husband nor any of her friends or relatives had been in any communication with Anita Isaacs, and that Anita's whereabouts were unknown (App. 9).

Counsel for defendant objected to the introduction of the recorded testimony at App. 12-13, *viz.*:

"The Court: Are you acquainted with the testimony about to be heard?

Mr. Plasco: Your Honor, for the record, I was furnished the day before trial with a copy of a transcript that allegedly took place at a preliminary hearing in the Mentor Municipal Court on January 10, 1975. I have a number of objections to the admissibility of said transcript into evidence, or being read to the jury in the present case at bar.

The Court: Proceed.

Mr. Plasco: Thank you, your Honor. To begin with, I'm objecting to the constitutionality of Ohio

Revised Code Section 2945.49. The general purpose of a preliminary hearing is a discovery tool where the defense attorney attempts to get information out so he can best represent his client. It is not to eliminate hearsay. Many times hearsay evidence is intentionally left in so the defense attorney can get more information. * * *"

Defendant's counsel continued his objections through App. 14, specifically stating therein:

"Mr. Plasco: I further object your Honor, * * *

* * * * *

For these reasons, we would strongly object to the admissibility of the transcript as being prejudicial to Mr. Roberts' rights in violation of the U.S. Constitution—confrontation of witnesses, allowing hearsay testimony into evidence. Thank you."

Although the trial judge did not specifically overrule defendant's objections, he did say, at App. 14:

"The Court: That's the danger that you take when you conduct a fishing expedition in a preliminary, instead of going by the new rules providing for discovery. Proceed, Mr. Perez?

Mr. Perez: Proceed with argument, or proceed with—

The Court: With your transcript."

The defendant was found guilty by the jury on counts of forgery, receiving stolen property, and possession of heroin, and subsequently appealed the convictions to the Lake County Court of Appeals on the question presented herein. The Court of Appeals reversed the judgment of

the trial court on the grounds that the admission of the preliminary hearing testimony violated the defendant's Sixth Amendment right to confrontation of witnesses, and because the State had failed to make a showing of sufficient effort to locate the missing witness.

After allowing a motion filed by the State of Ohio to certify the record, the Ohio Supreme Court affirmed the judgment of the Court of Appeals. The Ohio Supreme Court held, as a matter of state law, that the language of the statute, "whenever the witness . . . cannot for any reason be produced," is satisfied by a showing that the witness has disappeared; that her whereabouts were entirely unknown.

But by a 4-3 majority, the Ohio Supreme Court affirmed the reversal of the conviction, holding that notwithstanding several U. S. Supreme Court decisions *contra*, the confrontation clause of the Sixth Amendment was offended in this situation because the witness was not *actually* cross-examined.

It is from the judgment of the Ohio Supreme Court that the State of Ohio sought a writ of certiorari. This Court granted certiorari on April 16, 1979.

SUMMARY OF ARGUMENT

I

The use of prior recorded testimony of a witness unavailable at trial is not repugnant to the confrontation clause of the Sixth Amendment when certain indicia of reliability are present. During the last hundred years this court has established that recorded testimony bears such indicia when taken at a judicial hearing when the accused

has the *opportunity* to cross-examine the witness. The unavailability of the witness must not be due to an act or omission of the prosecution and the state bears a burden of making a "good faith effort" to locate the witness and produce him at trial. The judicial hearing at which the testimony is recorded must be "full-fledged," with counsel available to the accused, sworn and recorded testimony, and an opportunity to cross-examine.

This court has stated that the mission of the Confrontation Clause is to assure the accuracy of the trial process and give the trier of fact a basis for evaluating the truth of the recorded testimony. Further, this court has stated that a state court was wrong in ruling that an opportunity to cross-examine at a preliminary hearing failed to provide the indicia of reliability required to satisfy the confrontation clause.

II

During his preliminary hearing, defendant, through his counsel, called a witness to testify on his behalf. To defendant's surprise, this witness refuted many of defendant's contentions, and incriminated him. The trial on this matter did not commence for fourteen months and by that time the witness could not be found. Pursuant to an Ohio statute, the trial court allowed the use of the transcript of the preliminary hearing testimony as evidence. Defendant was subsequently convicted.

The Court of Appeals reversed the decision on the grounds that a "good faith effort" to locate the witness was lacking. The Ohio Supreme Court affirmed the appellate decision but on different grounds. It did not find lack of a "good faith effort" but instead held that absent *actual* cross-examination, recorded preliminary hearing testimony would not be admissible at trial.

The Ohio high court was highly selective in the authority it cited in support of its conclusions. It made much of the *dicta* in one case and chose to ignore extensive other *dictum* recognizing indicia of reliability present in the testimony at issue. The dissent in the 4-3 decision accurately stated the applicable law and characterized the majority opinion as "highly subjective." The *opportunity* to cross-examine, the dissent accurately concluded, is the key to whether the demands of the confrontation clause are met, not whether actual cross-examination took place.

III

It is uncontroverted that the prosecution had no knowledge of the whereabouts of the missing witness. Any method for compelling attendance of a witness presupposes some knowledge of the witness' whereabouts. In the instant case, the witness' mother testified that neither she nor any member of the immediate family knew where the witness was living. The state did all in its power to secure attendance by issuing subpoenas to the last known residence. With absolutely no knowledge concerning the location of the witness, any further act by the state would have been in vain. The burden of making a good faith effort to produce a witness was met by the state and this witness clearly qualified as unavailable. Such unavailability establishes the necessary predicate for the introduction of prior recorded testimony.

IV

The opportunity afforded to the defendant to confront the witness at the preliminary hearing was sufficient to satisfy the confrontation clause of the Sixth Amendment.

As stated by this Court, the second prerequisite for introduction of a prior statement is the presence of indicia of reliability whether the statement—either in its content or in the manner of its taking—which affords the trier of fact a basis for evaluating truth.

This Court has outlined some of the indicia which would permit the use of testimony recorded at a preliminary hearing to later be used at trial. The circumstances of the preliminary hearing must closely approximate those at trial. The witness must be under oath. The accused must be represented by counsel and have an opportunity to cross-examine. The proceedings must be properly recorded.

All of these indicia were present in the case at bar and the requisite degree of reliability was assured.

A preliminary hearing in Ohio involves all the characteristics of a typical trial and can accurately be characterized as a "full-fledged" judicial hearing. Included is a full right of and opportunity for cross-examination. Such an opportunity afforded the defendant his right of confrontation.

Finally, it must be noted that the question of whether there actually was cross-examination at the preliminary hearing is open to dispute. Upon realizing the adverse nature of the witness' testimony, defense counsel began to use tactics, such as leading and argumentative questions, which are the hallmark of cross-examination. These tactics continued without objection by either the court or opposing counsel. The totality of circumstances under which testimony was taken at the preliminary hearing—including *de facto* cross-examination—afforded the jury at trial a satisfactory basis for evaluating the truth of the testimony, and thus the testimony was not erroneously admitted at trial.

ARGUMENT

I. The Case Law

The question presented here is one which this Court has recognized but never specifically decided in the several cases in which use of prior recorded testimony in a criminal trial has been discussed in light of the confrontation clause of the Sixth Amendment.

One hundred years ago in *Reynolds v. United States*,[1] this Court held that if a witness was wrongfully kept away from trial by a criminal defendant, that witness' testimony taken at a former trial of the defendant for the same offense may be used without offending the confrontation clause.

Sixteen years later, *Mattox v. United States*,[2] this Court considered the case of a murderer convicted not just once, but twice after the first conviction was reversed on appeal.

Between the first and second trials two witnesses had died, and the reporter's notes of the testimony of the two witnesses at the first trial were introduced at the second trial. In the second round of appeals, Mattox claimed such use of the prior recorded testimony violated his confrontation clause rights, a claim rejected by this Court, which commented:[3]

> The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.
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> * * * * *
>
> The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of, and many of the very cases which hold testimony such as this to be admissible also hold that not the substance of his testimony only, but the very words of the witness, shall be proven.

1. 98 U.S. 145 (1879).
2. 156 U.S. 237 (1895).
3. At 156 U.S. 242-244.

In 1900, in *Motes v. United States*[4], this Court first considered whether testimony taken and recorded at a *preliminary examination* could be used at the later trial of the same case when the witness became unavailable.

This Court noted, with approval, the words of a contemporary scholar:[5]

> In his Treatise on Constitutional Limitations, Cooley, after observing that the testimony for the People in criminal cases can only, as a general rule, be given by witnesses in court, at the trial, says: "If the witness was sworn before the examining magistrate, or before a coroner, and the accused had an *opportunity* then to cross-examine him, or if there were a former trial on which he was sworn, it seems allowable to make use of his deposition, or of the minutes of his examination, if the witness has since deceased, or is insane, or sick and unable to testify, or has been summoned but appears to have been kept away by the opposite party."

The Court noted, however, that the absence of the witness was due to the gross negligence of the government, and therefore "the case is not within any of the recognized exceptions to the general rule prescribed in the constitution."[6]

Four years after *Motes*, this Court completed the turn-of-the-century round of confrontation clause cases with *West v. Louisiana*.[7]

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4. 178 U.S. 458 (1900).
5. At 178 U.S. 472.
6. At 178 U.S. 474.
7. 194 U.S. 258 (1904).

West was not a confrontation clause case, but rather a due process case. This Court specifically declined to address the issue of compliance with the confrontation clause when preliminary examination testimony was used at a state criminal trial when the witness had permanently absented himself from the state.[8]

Nevertheless, *West* is both instructive and pertinent to the inquiry here.

The Court rejected West's due process claim,[9] commenting:

> The accused has, as held by the state court in such case, been once confronted with the witness, and has had opportunity to cross-examine him, and it seems reasonable that when the state cannot procure the attendance of the witness at the trial, and he is a nonresident and is permanently beyond the jurisdiction of the state, that his deposition might be read equally as well as when his attendance could not be enforced because of death or of illness, or his evidence given by reason of insanity.

Important in the analysis of the question was whether the common law permitted use of prior testimony merely because of the nonresidence or permanent absence of the witness. While this court concluded that nonresidence or permanent absence was not one of the reasons allowing use

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8. The Court noted, at 194 U.S. 264:

> "As the 6th Amendment does not apply to state courts, the question as to what is required under its provisions in order to reserve the right to be confronted with the witness is eliminated from any inquiry by the court in this case."

Not until *Pointer v. Texas*, 380 U.S. 400 (1965), discussed *infra*, did this court hold the confrontation clause applicable to the States via the Fourteenth Amendment.

9. *Id.*

of prior recorded testimony at common law,[10] it found no impediment in the due process clause to the state making a change in its own law to accommodate such use.[11]

A number of years passed before this Court directly dealt with the issue again. But *Pointer v. Texas*[12] provided the starting point for the last 19 years' litigation on the issue.

Bob Granville Pointer had been convicted of robbery after a trial in which the prior-recorded testimony taken at a preliminary hearing was offered against him. The witness whose testimony was introduced via the transcript had moved out of Texas and had no intention of returning.

This Court held, first, that the confrontation clause of the Sixth Amendment was applicable to the states,[13] overruling that portion of its holding in *West*.

But more importantly to the inquiry here, this Court held that Pointer was denied his right to confront the witness at the preliminary hearing because he was unrepresented by counsel and was not afforded the opportunity to cross-examine.

"As has been pointed out," this Court observed, "a major reason underlying the constitutional confrontation rule is to give a defendant charged with a crime an *opportunity* to cross-examine the witnesses against him."[14] (Emphasis added)

The analysis in *Pointer* then focused on *Mattox*,[15] where the transcribed testimony from a former trial, where

10. At 194 U.S. 262.
11. At 197 U.S. 263.
12. 380 U.S. 400 (1965).
13. At 380 U.S. 406.
14. At 380 U.S. 406, 407.
15. 156 U.S. 237.

the *opportunity* to confront existed, was constitutionally admissible at later trial. But at Pointer's preliminary hearing such opportunity to cross-examine did not exist. The lack of such opportunity was crucial, as this Court observed in conclusion:[16]

> The case before us would be quite a different one had (the witness') statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine. Compare Motes v. United States, supra, 178 U.S., at 474, 44 L. Ed. at 1156. There are other analogous situations which might not fall within the scope of the constitutional rule requiring confrontation of witnesses. The case before us, however, does not present any situation like those mentioned above or others analogous to them. Because the transcript of (the witness') statement offered against petitioner at his trial had not been taken at a time and under circumstances affording petitioner through counsel an adequate opportunity to cross examine (the witness), its introduction in a federal court in a criminal case against Pointer would have amounted to denial of the privilege of confrontation guaranteed by the Sixth Amendment. Since we hold that the right of an accused to be confronted with the witnesses against him must be determined by the same standards whether the right is denied in a federal or state proceeding, it follows that use of the transcript to convict petitioner denied him a constitutional right, and that his conviction must be reversed.

The facts in *Barber v. Page*[17] were similar to those in *Pointer* in that the prior recorded testimony of an "un-

16. At 380 U.S. 407, 408.
17. 390 U.S. 719 (1968).

available" preliminary hearing witness was introduced at Barber's trial. The facts differ in that (a) Barber's attorney had every opportunity to, but did not, cross-examine the missing witness at the preliminary hearing, and (b) the "unavailable" witness was in a known location (a federal prison) but 225 miles from the situs of the trial, and was, with minimal effort, actually "available" to the prosecution through legal process.[18]

This latter difference was crucial in this Court's analysis of the case. The utter lack of any effort whatever to secure the witness' presence at trial, when his whereabouts were known, justified the holding that Barber was denied his right of confrontation. This Court observed:[19]

> In short, a witness is not "unavailable" for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial. The State made no such effort here, and, so far as this record reveals, the sole reason why the witness was not present to testify in person was because the State did not attempt to seek his presence. The right of confrontation may not be dispensed with so lightly.

The Court then asked, but left unanswered, a question it must decide herein: whether opportunity to confront at a preliminary hearing is, constitutionally, equivalent to opportunity to confront at trial. It was observed:[20]

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18. See note 4 at 390 U.S. 724, discussing the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, and the common law *writ of habeas corpus ad testificandum*. Neither of these remedies were available to petitioner herein at respondent's trial, as the whereabouts of missing witness Anita Isaacs were entirely unknown.

19. At 390 U.S. 724-725.

20. At 390 U.S. 725-726.

Moreover, we would reach the same result on the facts of this case had petitioner's counsel actually cross-examined (the witness) at the preliminary hearing. (Citing *Motes*.) The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial. While there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable, this is not, as we have pointed out, such a case.

If the language, above, stood alone, it is unlikely that any prosecutor—including petitioner herein—would attempt to assert that confrontation at a preliminary hearing could be equivalent to confrontation at trial.

Yet the antagonism to the proposition so evident in the language from *Barber*, quoted above, was as evidently missing from the opinion in *California v. Green*,[21] where this Court said, as a prelude to the opinion:

> The California Supreme Court construed the Confrontation Clause of the Sixth Amendment to require the exclusion of (the witness') prior testimony offered in evidence to prove the State's case against Green because, in the court's view, neither the right to cross-examine (the witness) at the trial concerning his current and prior testimony, *nor the opportunity to*

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21. 399 U.S. 149 (1970).

cross-examine Porter at the preliminary hearing satisfied the commands of the Confrontation Clause. We think the California court was wrong on *both* counts. (Emphasis added)

Green posed the precise question of whether the confrontation clause is offended by use of recorded preliminary hearing testimony to impeach different testimony by a prosecution witness at trial. It was clear that the presence of the witness at trial met the commands of the confrontation clause, and this Court so held,[22] but it went further, commenting:[23]

> "We also think that (the witness') preliminary hearing testimony was admissible as far as the Constitution is concerned wholly apart from the question of whether respondent had an effective opportunity for confrontation at the subsequent trial. For (the witness') statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial. (The witness) was under oath; respondent was represented by counsel—the same counsel in fact who later represented him at the trial; respondent had *every opportunity* to cross-examine (the witness) as to his statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings. Under these circumstances, (the witness') statement would, we think, have been admissible at trial even in (the witness') absence if (the witness) had been actually unavailable, despite good-faith efforts of the State to produce him. That being the case, we do not think a different result

22. At 399 U.S. 164.

23. At 399 U.S. 165.

> should follow where the witness is actually produced." (Emphasis added)

Thus, a conflict in *dictum*: antagonism to the use of recorded preliminary hearing testimony in *Barber*, and acceptance two years later in *Green*. This conflict is one which this Court must resolve herein.

The Court, however, will not be without some guidance from its past decisions.

In *Green*,[24] this Court spoke of the "indicia of reliability" which are the basis for the various exceptions to the hearsay rule and which also form the basis for exceptions to the literal right of confrontation.[25]

Such indicia were noted in the early cases. In *Reynolds*,[26] such indicia were found in the fact that testimony was taken at another trial on the same charge, but under a different indictment, at which the defendant was present and had full opportunity to cross-examine.

In *Mattox*,[27] the indicia of reliability in a statement given under oath were compared with those in a dying declaration:[28]

> A technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused,

24. At 399 U.S. 161-162.

25. *Green* also decided, at 399 U.S. 155-156, that the confrontation clause was *not* mere codification of common law heresay rules, but that it was independent of such rules. Thus, evidence admissible as an exception to hearsay rules may violate the confrontation clause, and evidence which is constitutionally permissible under the confrontation clause may be inadmissible as heresay.

26. *Supra*, note 1.

27. *Supra*, note 2.

28. At 156 U.S. 243-244.

and farther than the safety of the public will warrant. For instance, there could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations. They are rarely made in the presence of the accused; they are made without any opportunity for examination or cross-examination; nor is the witness brought face to face with the jury; yet from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility. They are admitted not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules, simply from the necessities of the case, and to prevent a manifest failure of justice. As was said by the Chief Justice when this case was here upon the first writ of error, 146 U.S. 140, 152 (36: 917, 921), the sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath. If such declarations are admitted, because made by a person then dead, under circumstances which give his statements the same weight under oath, there is equal if not greater reason for admitting testimony of his statements which were made under oath.

In *Motes*, where, as in *Barber*, the crucial issue was not the reliability of the evidence but rather the negligence of the goverment, the appropriate indicia were found, again in testimony given at a prior judicial hearing, under oath, and subject to cross-examination by defendant's counsel.

And in *West*,[29] the question was whether due process permitted mere absence from the jurisdiction to justify

29. *Supra*, note 7.

the use of prior recorded testimony. This Court resolved that issue in favor of the state, but noted[30] the familiar indicia: a prior judicial hearing, the defendant present, and an opportunity to cross-examine by counsel.

Thus, by the time of the modern cases, "indicia of reliability" had become the touchstone of the test of admissibility of evidence which conformed to the confrontation clause. Further, certain familiar factors—the circumstances of a judicial hearing—had become ingrained in the common law as such indicia.

Then came *Dutton v. Evans*,[31] in which the testimony offered had not been taken at a judicial tribunal with the aforementioned indicia of reliability.

Evans had been convicted of murder after a trial in which eyewitnesses described in detail the execution-style killings of three police officers. But the testimony also included a statement, related by a former federal prisoner, that while in prison one of Evans' co-conspirators implicated Evans in the murders. Evans, in a habeas corpus proceeding, alleged a violation of the confrontation clause.

Certainly, the statement made in prison was not made in a judicial setting and thus did not fit the familiar indicia. Yet the plurality of this Court[32] found no violation of the confrontation clause because the statement bore *other* indicia of reliability related to content and circumstances.

Thus, *Evans* teaches that the familiar judicial-setting indicia of reliability are not the *only* indicia which may provide a basis for an exception to literal enforcement of the confrontation clause. *Other* indicia—provided they show the basic purpose of the clause will be met—will

30. At 194 U.S. 264.

31. 400 U.S. 74 (1970).

32. At 400 U.S. 89.

allow relaxation of its strict commands in the interests of justice.

As the plurality noted:[33]

> The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact (has) a satisfactory basis for evaluating the truth of the prior statement.'

Finally came *Mancusi v. Stubbs*,[34] the last of the confrontation cases to be discussed herein. Stubbs was convicted of a felony in a New York state court, which used an earlier Tennessee murder and kidnapping conviction as a predicate for sentencing him to an enhanced prison term as a second offender. The Tennessee conviction was the result of a second trial (an earlier conviction having been vacated via habeas corpus on the ground of inadequate assistance of counsel).

By the time of the second trial, one of the victims of the kidnapping, a crucial prosecution witness, had become a permanent resident of Sweden. The transcript of that witness' testimony at the first trial was introduced at the second trial, setting the stage for a second habeas corpus proceeding on the issue of confrontation.

The second habeas corpus action reached this court, which held the opportunity of cross-examination afforded at the first trial provided sufficient indicia of reliability to allow the trier of fact in the second trial a satisfactory basis for evaluating the truth of the prior statement. This court also held that the Tennessee Court could have, and

33. *Id.*, quoting *Green*, 399 U.S. at 161.

34. 408 U.S. 204 (1972).

did find the witness was unavailable. Thus, the use of the transcript at the second Tennessee trial did not offend the confrontation clause, and the murder-kidnap conviction formed a valid basis for the more severe sentence imposed by the New York Court.

After reviewing *Barber*, *Green*, and *Evans*, this court summarized:[35]

> It is clear from these statements, and from numerous prior decisions of this court, that even though the witness be unavailable his prior testimony must bear some of these 'indicia of reliability' referred to in Dutton.

The focus then turned to whether such indicia could be found in the transcript taken at the first trial. This court found such indicia:[36]

> Since there was an adequate opportunity to cross-examine (the witness) at the first trial, and counsel for Stubbs availed himself of that opportunity, the transcript of (the witness') testimony at the first trial bore sufficient "indicia of reliability" and afforded "The trier of fact a satisfactory basis for evaluating the truth of the prior statement." (Citing *Dutton*)

It was the case law discussed above which was available to the Ohio Supreme Court when it reached the decision appealed from herein. In summary:

In *Reynolds*,[37] a transcript of testimony taken at a trial was held admissible at a second trial where the witness was kept away by the defendant.

35. At 408 U.S. 213.

36. At 408 U.S. 216.

37. *Supra*, note 1.

In *Mattox,*[38] a transcript of testimony taken at a trial was held admissible at a second trial where the witness had died.

In *Motes,*[39] the court noted the general acceptance of transcripts taken at a preliminary hearing where the witness was unavailable, but held that because the unavailability of the witness was entirely the fault of the government, that the use of the transcript offended the confrontation clause.

In *West,*[40] a due process case, this court held a transcript of preliminary hearing testimony could be used at a state criminal trial when a witness had permanently absented himself from the state and was beyond reach of its process.

More than half a century later, in *Pointer,*[41] this court extended the protection of the confrontation clause to state criminal defendants, then considered whether a transcript of preliminary hearing testimony could be used at trial when the witness had moved out of the state. Because Pointer had no opportunity to confront or cross-examine the witness at the preliminary hearing, it was held, no right of confrontation was afforded and Pointer was thus denied the Sixth Amendment right.

In *Barber,*[42] the absolute failure of the prosecution to attempt to secure the presence of witness known to be incarcerated only 225 miles from the trial site was the basis for holding that Barber had been denied his right of con-

38. *Supra,* note 2.

39. *Supra,* note 4.

40. *Supra,* note 7.

41. *Supra,* note 12.

42. *Supra,* note 17.

frontation. But, in *dictum,* the court commented[43] in a manner antagonistic to the concept that opportunity to cross examine at a preliminary hearing will satisfy the confrontation clause where the witness is unavailable at trial.

Such antagonism was not evident in *Green,*[44] where preliminary hearing testimony was held to be properly used in extensively impeaching a prosecution witness who had "forgotten" crucial details of a drug deal at trial. Green also categorized the judicial nature of the preliminary hearing as "indicia of reliability" which permitted use of the prior recorded testimony.

In *Evans,*[45] the plurality held a statement made in a non-judicial setting may be used at trial without violating the confrontation clause provided it bears some indicia of reliability based on other than the traditional "judicial setting" factors.

And in *Stubbs,*[46] indicia of reliability were found where testimony taken at a trial—a judicial setting—was introduced at a second trial after the witness had moved out of the country.

II. The Case Below

A brief restatement of the facts may be helpful here.[47] Herschel Roberts was arrested by the Mentor, Ohio Police Department on January 7, 1975, and charged with forging

43. *Supra,* note 20.

44. *Supra,* note 21.

45. *Supra,* note 31.

46. *Supra,* note 34.

47. A more extensive recitation of the facts summarized here may be found in the opinion of the Supreme Court of Ohio, in the Petition, at 15-18.

a check in the name of Bernard Isaacs, and with receiving other property, namely, a number of credit cards belonging to Mr. Isaacs and his wife, Amy.

On January 10, 1975, Roberts was brought before the Mentor Municipal Court for a preliminary hearing. Anita Isaacs, daughter of the victims, was called *by the defendant* to testify in his behalf. She surprised counsel by refuting Roberts' contentions that she, Anita, had been living with Roberts and had given him the check and credit cards at issue.

After the hearing, the Municipal Court found probable cause to believe a crime had been committed and that Roberts was guilty, and bound him over to the Lake County Grand Jury. In due course he was indicted, but because of extensive delays caused by Roberts, trial did not commence until March 4, 1976.

By that time, Anita could not be found. Her mother testified,[48] in a hearing outside the presence of the jury, that Anita's whereabouts were entirely unknown, that Anita was probably outside the state of Ohio, and that there was no way to contact Anita, even in an emergency. Pursuant to a state statute[49] specifically permitting the use of preliminary hearing testimony when the witness becomes unavailable, the trial court admitted into evidence

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48. App. 8-11.

49. Section 2945.49, Ohio Revised Code, reads:

"Testimony taken at an examination or a preliminary hearing at which the defendant is present, or at a former trial of the cause, or taken by deposition at the instance of the defendant or the state, may be used whenever the witness giving such testimony dies, or cannot for any reason be produced at the trial, or whenever the witness has, since giving such testimony, become incapacitated to testify. If such former testimony is contained within a bill of exceptions, or transcript, otherwise by other testimony."

the transcript of the preliminary hearing testimony of Anita Isaacs.

Roberts was subsequently convicted of the charges against him,[50] and appealed.

The Court of Appeals for Lake County, Ohio reversed the conviction, finding the state failed to make a showing of sufficient effort to locate Anita Isaacs to constitute the "good faith effort" required by *Barber v. Page*,[51] and that therefore Roberts was denied the right of confrontation guaranteed by the Sixth Amendment.[52]

After allowing a motion for leave to appeal, the Supreme Court of Ohio affirmed the judgment of the Court of Appeals, but on different grounds.

Roberts, the Ohio Supreme Court ruled in its 4-3 decision, was denied his confrontation right not because the state failed to show a good faith effort,[53] but rather because absent *actual* cross-examination, recorded preliminary hearing testimony may not be introduced at trial.[54]

The court reached the result by overemphasizing the differences between a preliminary hearing and a trial in Ohio,[55] by ignoring the extensive examination of Anita Isaacs by defense counsel at the preliminary hearing,[56]

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50. Roberts was convicted of forgery, receiving stolen property (the credit cards), second count of receiving stolen property (silver items belonging to Mr. and Mrs. Isaacs) and possession of heroin (a small amount of which was found in his wallet).

51. 390 U.S. 719 (1968).

52. The opinion of the Court of Appeals is reproduced in the Appendix, at 1-7.

53. The showing of unavailability will be discussed in greater detail in Section III, *infra*.

54. See Petition, at 21-22.

55. This matter will be extensively explored in Section IV, *infra*.

56. *Id.*

and by selectively choosing which *dictum* in prior decisions of this Court it would recognize as holding.

The Ohio Supreme Court admits[57] "the basic factual issues—*e.g.* whether the defendant had stolen (sic)[58] the credit cards—were the same(,)" at the preliminary hearing as at trial. Yet it made much of the concern this court expressed in *dictum* in *Barber*[59] regarding the "much less searching exploration into the merits of a case" common to preliminary hearings, while wholly ignoring the later *dictum* in *Green*[60] which referred to the taking of testimony in a traditional judicial setting as indicia of reliability. Eventually, the Ohio Supreme Court decided that *Barber* "requires" the rule it fashioned,[61] not because the prosecution's actions failed to meet the "good faith" effort test announced in *Barber*, not because a preliminary hearing is a different kind of judicial hearing, but rather because *Barber* also held a lack of cross-examination at a preliminary hearing does not constitute a waiver of that right at trial![62]

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57. Petition, at 21.

58. No allegation was ever made that Herschel Roberts had stolen any of the items belonging to Bernard Isaacs, and Roberts was not charged with the burglary. Any supposition that Roberts was, in fact, the burglar, would be mere conjecture. How Roberts acquired the items in question is a mystery; yet it must be emphasized that the state is not required to prove the circumstances of receipt of the items to sustain a conviction.

59. At 390 U.S. 725-726, quoted *supra* at 17.

60. At 399 U.S. 165, quoted *supra* at 18-19.

61. Petition, at 22.

62. Reliance on this language from *Barber* is perhaps the most confusing part of the opinion, as the issue of waiver had neither been briefed nor argued before that court. Indeed, the State of Ohio has never contended, and does not now contend, that Roberts waived any Sixth Amendment right. What is contended, simply, is that under the facts, the commands of the Sixth Amendment were satisfied.

The Ohio Supreme Court then proceeded to consider *Green*, distinguishing its *dictum* away on the facts. While the court could have distinguished *Green* because the witness was available at trial, it chose instead to characterize the preliminary hearing in *Green* as "atypical in that the witness' story * * * was subject to extensive cross-examination. . . ."[63]

In his dissent, Justice, and now Chief Justice Celebrezze was obviously puzzled by the approach taken by the majority, commenting:[64] "This rather incongruous result is reached by indulgence in conjecture relative to the trial tactics of defense counsel, and is supported only by the highly subjective opinion that '* * * The mere opportunity to cross-examine at a preliminary hearing can not be said to afford confrontation for purposes of the trial.'"

The dissent summarized the *dictum* of *Barber, Green,* and *Pointer* ignored or distinguished by the majority, then proceeded to conclude with a focus on the majority's emphasis of trial tactics as a reason for its holding. The dissent concluded:[65] "(t)he extent of cross-examination whether at a preliminary hearing or at a trial, is a trial tactic. The manner of use of that trial tactic does not create a constitutional right."

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63. See Petition, at 24. As we shall see in Section IV, *infra*, the examination of witness Anita Isaacs by defendant's counsel was not only extensive, unimpeded, and thorough, but at times included leading and argumentative questions which are the hallmark of cross-examination. Thus, the assertion by the Ohio Supreme Court, Petition at 24, that "The witness (Anita Isaacs) was never cross-examined," may be correct as a matter of technicality, but is surely incorrect as a matter of fact.

64. See Petition, at 25.

65. See Petition at 26, quoting *United States v. Allen,* 409 F.2d 611, 613 (10th Cir., 1969).

Thus, the stage was set for this court to grant certiorari and review the "highly subjective" opinion of a bare majority of the Ohio Supreme Court.[66]

III. The Unavailable Witness

It is firmly established and beyond question at this juncture that a necessary predicate to the introduction of any prior recorded testimony at a criminal trial is the unavailability of the witness. Since *Barber v. Page*,[67] it can also not be doubted that the mere absence of the witness from the jurisdiction will not suffice to establish that predicate; that the state must show both that the witness was actually unavailable and that it made a "good faith" effort to locate the witness and bring such a witness before a court.

And while the issues of whether Anita Isaacs was, in fact, unavailable, and whether the state made a good-faith

66. On June 13, 1979, the Ohio Supreme Court relied on its decision in the case herein in *State v. Ricardo Smith*, to be reported at 58 Ohio St. 2d 344. In *Smith*, the Ohio Court held, in a *Per Curiam* opinion: "Thus, the *Roberts* rule includes preclusion of an unavailable witness' testimony at the preliminary hearing where the record shows that the witness was cross-examined only briefly and ineffectively."

As in *Roberts*, *Smith* produced a sharp split in the Ohio Supreme Court, with the opinion agreed to by only a bare 4-3 majority, the dissenters citing the dissent in *Roberts*. Of special import is nature of the split on the Court. Former Chief Justice O'Neil, author of the *Roberts* opinion, died in October, 1978, and was replaced by Justice Celebrezze. Justice Holmes was elected to the bench at the November, 1978 election.

In *Smith*, Justice Holmes joined the dissent. Justice Locher, who had dissented in *Roberts*, did not sit in *Smith*, but was replaced, temporarily, by Judge McCormac of the state's Tenth Appellate District. Judge McCormac joined the majority in *Smith*.

Thus, it appears that with the addition of Justice Holmes to the bench, a majority of the Ohio Supreme Court has stated opposition to the *Roberts* rule, and that the future of *Roberts* as viable law in Ohio is in serious doubt even absent action by this Court.

67. 390 U.S. 719 (1966).

effort to secure her presence are not the basic issues herein, they do warrant limited discussion.

The Court of Appeals for Lake County was unsatisfied wth the explanation in the record as to Anita Isaacs' absence and devoted most of its opinion[68] to a discussion of whether the state made a showing of "clear-cut unavailability."[69]

The Ohio Supreme Court held the Court of Appeals was in error on that point:[70]

> In the instant cause the (defendant) argues that the state failed to show a good-faith effort to produce the witness in person, as required by the rule in *Barber*. But in *Barber*, the government knew where the absent witness was. In the instant cause, the reason for the witness' unavailability was not that she was at some known location beyond the court's power of subpoena, but that her whereabouts were entirely unknown; and it is recognized that a witness who has disappeared from observation is unavailable for purposes of the confrontation clause. Wigmore, *supra*, 215, Section 1405, and cases therein cited. As a matter of state law, R.C. 2945.49, authorizing the use of prior recorded testimony 'whenever the witness * * * cannot for any reason be produced,' is broad enough to cover instances where the witness has disappeared.
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> * * * * *
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> . . . we hold that in the present cause, the trial judge could reasonably have concluded from Mrs.

68. App. 1-7.

69. App. at 4.

70. See Petition, at 19, 20.

Isaacs' *voir dire* testimony that due diligence could not have procured the attendance of Anita Isaacs.

* * * * *

Therefore, the trial judge could properly hold that the witness was unavailable to testify in person.

This conclusion as a matter of state law is also correct as a matter of federal constitutional law.

As this court noted in *Barber*, if the state desires the testimony of a witness who is incarcerated, and *has knowledge of the whereabouts* of that person, it may seek writs of *habeas corpus ad testificandum* or *habeas corpus ad prosequendum* to produce that witness.[71]

For witnesses not in prison, this Court noted, the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings[72] provides a means by which prosecuting authorities from one state can obtain an order from a court in the state where the witness *is found* directing the witness to appear in court in the first state to testify. The state seeking the witness' appearance must pay the witness a specified sum as a travel allowance and compensation for his time.[73]

Yet one particular fact must be known about an out-of-state witness before he can be summoned through the Uniform Act: *the location of said witness.* As the Ohio Supreme Court commented in a case where a convicted

71. 390 U.S. at 724.

72. The Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings has been adopted in Ohio and forms Sections 2939.25, *et seq.* of the Ohio Revised Code. Pursuant to its terms, adoption of the Act in Ohio allows prosecutors or defendants to ask other states to compel the attendance at trials in this state of witnesses *known* to be in other states which have adopted the Act.

73. 390 U.S. at 723, note 4.

criminal sought a writ of habeas corpus on the grounds that he was denied compulsory process:[74]

> Inasmuch as a state's process cannot extend beyond its borders, and thus, the state can not as a matter of right compel the attendance of a witness beyond its borders but can only procure such witnesses by the voluntary co-operation of another state, clearly the accused must be able to designate the witness *and his location with exactitude* before any duty devolves on the court to initiate the complex judicial process necessary under these acts to procure the attendance of out-of-state witnesses. (Emphasis added)

Surely the State of Ohio could bear no lesser burden than a criminal defendant. If a defendant must designate the location of a desired witness *with exactitude* before invoking the Uniform Act, so also must the state. Thus, when the location of a witness is unknown, the Uniform Act provides no tool to secure that witness' presence.

The facts herein are uncontroverted that the state had *no knowledge* of the whereabouts of the Anita Isaacs, and further that even her immediate family had no such knowledge.

The very persons who would most likely know where the witness was—her parents—had no knowledge of her whereabouts. How, then, was the State of Ohio to locate her and produce her at trial?

It cannot be disputed that the State of Ohio did all in its power to secure the presence of Anita Isaacs at trial by issuing subpoenas to her last known residence in the state. Other tools to secure the witness' presence were not used because without knowledge of her whereabouts,

74. *Lancaster v. Green*, 175 Ohio St. 203 at 205, 192 N.E.2d 776 (1963).

such tools would have been useless. And the law does not mandate the doing of a vain act.

The test mandated by this Court in *Barber* and *Green* was thus met by the State of Ohio in this case.

Any other standard would require that the State maintain constant surveillance of a State's witness before trial, or be barred from using prior recorded testimony. Any other standard would require the State to mount cross-country manhunts for witnesses who had exercised their right to travel to distant portions of this country with little more than a farewell.

The Ohio Supreme Court therefore did not decide the issue of actual unavailability in conflict with the federal standard established in *Barber*. The predicate for use of prior recorded testimony was established, and the only question remaining is thus one of whether the recorded testimony introduced in Roberts' trial bore sufficient indicia of reliability to meet the commands of the Sixth Amendment.

IV. The Prior-Recorded Testimony

We now turn to the central issue in this case: whether Herschel Roberts was denied his Sixth Amendment confrontation rights at trial by use of Anita Isaacs' recorded preliminary hearing testimony.

A. The opportunity afforded to cross-examine Anita Isaacs at the preliminary hearing satisfied the commands of the confrontation clause.

In the early cases, reviewed in Section I, *supra*, it became well established that recorded testimony taken at a prior judicial-type hearing would be admissible at a

federal criminal trial provided (a) The defendant was present at the time the testimony was taken, (b) that he was afforded the *opportunity* to cross-examine and (c) the "unavailability" predicate was established.[75] Until *Green*, these factors stood alone as perhaps the only factors which would permit an exception to the strict observance of the confrontation clause.

But in *Green*, followed later in *Dutton* and *Stubbs*, this court established that the judicial-setting factors are only some of many possible "indicia of reliability" which "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement."[76]

It is submitted here that the *opportunity* afforded Roberts to confront Anita Isaacs at the preliminary hearing is indicia of reliability which, standing alone, afforded the trier of fact with the basis it needed to evaluate the truth of her statement.

It is true that in *Barber*, this court spoke in an antagonistic manner to such a proposal,[77] citing the "ordinarily much less searching exploration of the case (at a preliminary hearing) than at trial."[78] The Ohio Supreme Court seized upon this *dictum* as it reached its decision.

Yet the comment in *Barber* is, itself, not consistent with the *dicta* in the other confrontation cases. *Reynolds*[79] and *Mattox*[80] were, of course, cases where the recorded

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75. The "unavailability" predicate, as has been discussed in Section III, *supra*, was well established in this case.

76. *Dutton*, 400 U.S. at 88-89.

77. At 390 U.S. 725-726.

78. *Id.*

79. 98 U.S. 145 (1879).

80. 156 U.S. 237 (1895).

testimony was taken at a *trial.* Yet *Motes*[81] involved approval of testimony taken at a preliminary hearing, as did *West.*[82] In *Pointer v. Texas,*[83] preliminary hearing testimony was rejected, but with the proviso:[84]

> The case before us would be quite a different one had (the witness') statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given complete and adequate opportunity to cross-examine.

Barber, of course, included language antagonistic to the proposition advanced here. Still, this court was careful to note:[85]

> ". . . there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable. . ."

In *Green,* of course, this Court set forth the indicia in Green's preliminary hearing which would permit the recorded testimony to be used at trial:[86] The circumstances of the preliminary hearing closely approximated those at trial. The witness was under oath. The defendant was represented by counsel who had *every* opportunity to cross-examine. Finally, the proceedings were before a tribunal equipped to provide a judicial record of the testimony.

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81. 178 U.S. 458 (1900).
82. 194 U.S. 258 (1904).
83. 380 U.S. 400 (1965).
84. At 280 U.S. 407, 408.
85. At 390 U.S. 725-726.
86. At 399 U.S. 165.

All of these indicia are present in the case herein.

Of course, the factors mentioned above do not become indicia of reliability by simply mentioning them. They are indicia because they do, in themselves, offer the trier of fact the basis for evaluating the truth of what is presented.

The judicial record insures that the words presented are precisely those used at the prior hearing. The presence of counsel insures that an advocate will be present to raise evidentiary objections—themselves designed to ensure reliability—and, if warranted, inquire of the witness as to discrepancies in testimony or factors regarding credibility.

The judicial setting impresses the witness with the importance of the proceeding and the oath cements that impression into the witness' mind. Finally, the opportunity to cross-examine—the "great engine of truth"—exists, not only to sift the facts from the falsity, but also to provide the witness with no incentive to testify falsely in the first instance.

The latter factor was ignored by the Ohio Supreme Court in its decision herein. An extensive and vigorous cross-examination of a witness, if conducted skillfully, may indeed expose contradictions and weaknesses in the witness' testimony, thereby giving the trier of fact a basis for determining the truth of the statement.

But the benefits of cross-examination guaranteed to a criminal defendant by the confrontation clause do not evaporate if no cross-examination actually occurs.

The prosecution witness does not know, during direct examination, whether he will be cross-examined. He does know, however, that the defense counsel has the opportunity and likely will attempt to attack his story

and his credibility. Thus, the witness will have every incentive to avoid the embarrassment (and possible criminal charge for perjury) which would be the result of discovery of false testimony during a probing cross-examination.

Thus, the mere availability of cross-examination provides much of the protection afforded by the *actuality* of its use. It is this factor which provides the indicia of reliability so frequently recognized in the cases discussed *infra*.

Indeed, the indicia of reliability within a statement taken at a judicial hearing where the witness must face the accused are stronger than the indicia in a dying declaration, where, as noted in *Mattox*,[87] the statements are not made in the presence of the accused, are not subject to cross-examination, and are not made in court so that the witness' demeanor may be observed by the jury. Yet, dying declarations have been admissible for centuries even where they form the basis for a homicide case against the accused. If dying declarations do not offend the confrontation clause, then certainly testimony taken at a judicial hearing where the accused has had the opportunity to confront and cross-examine the witness, should be acceptable also.

As noted in *Mattox*:[88]

> "The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of cross-examination. Thus, the law says, he shall under no circumstances be deprived of . . ."

87. At 156 U.S. 243-244.

88. *Id.*

We now turn to the objections to the proposition advanced here.

The first was stated succinctly by the Court of Appeals for Lake County:[89] "This right of confrontation of the absent witness, as a witness against him, did not occur at trial."

That premise—that *the right of confrontation is basically a trial right*—is not incorrect. Indeed, in *Barber*, the premise was stated in precisely those words.[90]

But it cannot be disputed at this juncture that the rule quoted from *Barber* is not absolute. As stated in *Barber* and echoed in all the other confrontation cases discussed herein, the rule is that the confrontation clause is a *preferential* rule which requires the State to produce its witnesses in person when available. Where the witness is unavailable, the cases have taught us, the confrontation clause requires that testimony against the accused be accepted in other forms only if the State has made a good faith effort to secure the presence of the witness, and if the testimony bears indicia of reliability.[91]

89. App. at 3.

90. At 390 U.S. 125.

91. Professor Peter Westen argues that the confrontation clause mandates only that the State produce the witness in person, if available. He suggests the remaining requirements set forth in the cases—good faith effort and indicia of reliability—are imposed not by the confrontation clause, but by the due process clause. See Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARVARD LAW REVIEW, No. 3, 561 at 599-601 (January, 1978).

Acceptance of Professor Westen's well-reasoned argument by this court would give new significance to *West v. Louisiana*, 194 U.S. 258 (1904), wherein it was held that due process is not denied by the rule set forth at 13, *supra*, and proposed here as applicable to the confrontation clause as well. Indeed, if Professor Westen is correct, then *West* would be dispositive of the question presented here, as the analysis in Section III, *supra*, establishes compliance with the confrontation clause in this case, and the State has met the demands of the due process clause as established in *West*.

This much, at least, cannot be disputed at this juncture: The right of confrontation, although *basically* a trial right, is not *absolutely* a trial right. Where the necessities of a case demand, the opportunity to confront at a prior judicial hearing of the same cause has been held to afford a criminal defendant the essentials of his right to confront the witnesses against him. Thus, the confrontation clause was not offended in this case merely because the confrontation did not occur at trial.

The second objection to the proposition advanced here is that although it is a judicial hearing, a preliminary hearing is of a type different than a trial, with different levels of proof. Opportunity for confrontation at this level, the objection continues, cannot be said to afford confrontation for purposes at trial.[92]

At this juncture, it may be helpful to examine the nature of preliminary hearing in Ohio.[93]

The preliminary hearing in Ohio is a "full-fledged" judicial hearing[94] under which the circumstances closely approximate those surrounding a typical trial.[95]

As required by Ohio Crim. R. 5(B)(2):

> (2) At the preliminary hearing the prosecuting attorney may, but is not required to, state orally the case for the state, and shall then proceed to examine witnesses and introduce exhibits for the state. *The defendant and the judge have full right of cross-*

92. See *Barber v. Page* 390 U.S. 719 at 725-726; Opinion of the Ohio Supreme Court, Petition at 20-21.

93. Criminal procedure in Ohio is governed by the Ohio Rules of Criminal Procedure, promulgated by the Supreme Court and subject to veto by the legislature via a concurrent resolution of disapproval. See Article IV, Section 5 (B), Ohio Constitution.

94. See *Pointer*, at 380 U.S. 407-408.

95. See *Green*, at 399 U.S. 165.

> *examination, and the defendant has the right of inspection of exhibits prior to their introduction. The hearing shall be conducted under the rules of evidence prevailing in criminal trials generally.* (Emphasis added)

At the conclusion of the state's case, a defendant may move for discharge for failure of proof and may offer evidence on his own behalf.[96]

Upon conclusion of all the evidence and statement, if any, of the accused, the examining judge may find probable cause to believe the crime alleged or another felony has been committed, that the defendant committed it, and bind the defendant over to the Court of Common Pleas for action by the Grand Jury; find probable cause to believe a misdemeanor has been committed and that the defendant committed it, then hold the defendant for trial at the lower court level; or discharge the defendant.[97]

But the Criminal Rule makes clear:[98]

> Any finding requiring the accused to stand trial on any charge shall be based solely on the presence of *substantial credible* evidence thereof. . . . (Emphasis added)

The accused has the *right to be present* at the preliminary hearing[99] as well as all subsequent proceedings

96. Ohio Crim. R. 5(B)(3).

97. Ohio Crim. R. 5(B)(4).

98. Ohio Crim. R. 5(B)(5).

99. This requirement is implied from the language of Ohio Crim. R. 5(B)(3), which reads, in part, "defendant . . . may offer evidence on his own behalf," and Crim. R. 5(B)(2), which reads in part, "The defendant and judge have full right of cross-examination and the defendant has the right of inspection of exhibits prior to their introduction."

against him.[100] He has the *absolute right to counsel*[101] unless waived[102] when charged with a serious offense, which would include any felony. He also has the right to *compulsory attendance of witnesses* in his favor via subpoena of the court.[103]

It is obvious from the above that a preliminary hearing in Ohio not only meets the commands of the Fourth Amendment as set forth in *Gerstein v. Pugh*[104] but goes further to provide:[105]

> ". . . a full panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process for witnesses. A full preliminary hearing . . ."

And as this court noted, in such hearings:[106]

> The standard of proof required of the prosecution is usually referred to as "probable cause", but in some jurisdictions it may approach a prima facie case of guilt . . . When the hearing takes this form, adversary procedures are customarily employed. The importance of the issue to both the State and the accused justifies the presentation of witnesses and full exploration of their testimony on cross-examination."

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100. Ohio Crim. R. 43.

101. Ohio Crim. R. 44(A).

102. Ohio Crim. R. 44(C).

103. Ohio Crim. R. 17(F). Subdivision (B) of Crim. R. 17 provides that where the accused is financially unable to pay the fees generally required for issuance and service of any subpoena, such subpoenas will be issued without payment. Subdivision (G) of the said rule provides that any failure to obey the commands of a subpoena may be deemed contempt of court.

104. 420 U.S. 103 (1975).

105. *Gerstein*, 420 U.S. at 119-120.

106. *Id.*

Thus, it cannot be disputed that the preliminary hearing afforded Roberts in this case was a "full-fledged" hearing, "closely approximating . . . an actual trial."[107] Under these circumstances, the *dicta* from *Pointer*[108] and *Green*,[109] as well as that from the early case provide a basis for this court to hold that the opportunity to cross-examine Anita Isaacs at the preliminary hearing afforded Roberts his right of confrontation.

In the third objection, closely related to the different-type-hearing objection, discussed above, it is claimed "the difference in the ultimate object of proof makes a great difference in the defense attorney's strategy."[110] It has even been suggested that "The general purpose of a preliminary hearing is a discovery tool where the defense attorney attempts to get information out so he can best represent his client."[111]

Both comments ignore the real purpose of the preliminary hearing: To afford the accused protection against possibly lengthy pretrial restraints on his freedom when the case against him is groundless.[112]

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107. Compare the hearings afforded in *Davis v. Alaska*, 415 U.S. 308 (1974), and *Smith v. Illinois*, 390 U.S. 129 (1968), where partial proscription of cross-examination existed, thus denying the right to confront. Compare also *Pointer*, where the accused had no counsel and no opportunity to cross-examine.

108. At 380 U.S. 407-408.

109. At 399 U.S. 165.

110. Opinion of the Ohio Supreme Court, Petition, at 21.

111. This suggestion was made by Roberts' attorney during argument regarding the admissibility of the transcript. See App., at 13. But as the trial judge correctly noted, at App. 14, a preliminary hearing is not a "fishing expedition." Indeed, Ohio provides, in its Crim. R. 16, for extensive discovery of the prosecution's case by the accused prior to trial.

112. See *e.g.*, *Gerstein v. Pugh*, 420 U.S. 103 (1975).

The factors which are mentioned by the Ohio Supreme Court[113] as having a practical effect on strategy, however, cannot be completely ignored. Indeed, these factors weighed heavily on the Sixth Circuit Court of Appeals when it decided *Havey v. Kropp,*[114] a case which is, in all material respects, identical to the case herein. The court discussed extensively[115] the strategy factors, and concluded that, absent more, these factors might well lead to a conclusion that the opportunity to confront at a preliminary hearing was not sufficient when the testimony was used at trial.

But the Sixth Circuit found counsel was not working with merely those factors. It noted a Michigan statute which was identical in operation as the statute involved herein.[116] The existence of the statute was crucial.[117]

> On the basis of such factors, were it not for existence of an applicable Michigan statute, it might be difficult to conclude that appellant had not been denied the right of confrontation. In the present circumstance, however, neither was the defendant nor are we now considering the issue in the absence of an applicable statutory provision. . .
>
> This statute was in effect at the time of the preliminary hearing and, therefore, when appellant by his counsel decided to conduct only what he considered to be a limited cross-examination, he did so at his own risk. The opportunity for unlimited cross-examination existed, and since he was chargeable

113. See Opinion, Petition at 21.

114. 458 F.2d 1054 (6th Cir., 1972).

115. At 458 F.2d 1056.

116. Compare Section 2945.49 with 458 F.2d 1056.

117. At 458 F.2d 1056-1057. Footnote omitted.

> with knowledge of the statute and his rights under it, he cannot now be heard to complain because by his own choice he did not fully cross-examine. (Emphasis added)

This logic is inescapable: while certain factors may militate against extensive cross-examination at a preliminary hearing, counsel has notice of the statute. He knows the testimony given at such a hearing may be used later at trial. If he chooses not to cross-examine or to do so perfunctorily, he does so at his client's risk.

This logic, of course, presumes that, as the dissent in the Ohio Supreme Court noted, "(t)he manner of use of (a) trial tactic does not create a constitutional right."[118] This Court has made that presumption clear on more than one occasion.[119]

The Ohio Supreme Court merely stated, without going further,[120] that Anita Isaacs was not cross-examined at the preliminary hearing. Yet the court made no mention of either the extensive examination of Miss Isaacs nor the *opportunity* counsel had of proceeding to cross-examine.

Roberts' attorney obviously had discussed the matter with his client prior to the preliminary hearing[121] and

118. Opinion of the Ohio Supreme Court, Celebrezze, J. dissenting, Petition, at 26, quoting *United States v. Allen,* 409 F.2d 611 (10th Cir., 1969).

119. *E.g., Wainwright v. Sykes,* 433 U.S. 72 at 91, note 14, quoting *Henry v. Mississippi,* 379 U.S. at 451 and *Estelle v. Williams,* 425 U.S. 501 at 512 (1976).

120. Petition, at 22.

121. See, *e.g.,* App., at 21, where counsel inquired as to whether Miss Isaacs and Roberts had ever discussed purchase of a television set, and App., at 17, where Miss Isaacs was questioned as to the dates when Roberts borrowed use of her apartment.

called Miss Isaacs in his defense. He was then surprised by her testimony which incriminated his client.

Counsel had every opportunity at that point to ask the court to declare her a hostile witness and proceed to cross-examine.[122] Counsel did not ask the court to exercise its discretion in that regard, a failure which cannot be imputed to the state.[123]

Thus, Roberts cannot complain of any state action which denied him access to Anita Isaacs or of the opportunity to confront her. He can only complain of his counsel's tactics at the hearing, tactics used with full knowledge that the statute could preserve the testimony for trial.

In summary, then, Roberts cannot complain that the confrontation clause demands absolute observance, because this court has made it clear that the clause is a *preferential* rule. He cannot complain that his preliminary hearing was of a kind totally different than that of a trial, because the hearing is founded in rules which demand it be of a full-blown adversarial nature. And he cannot complain that factors of strategy and tactics denied him the right to fully confront, because his counsel knew the testimony could be preserved for trial.

In short, Herschel Roberts had every *opportunity* to fully examine and cross-examine Anita Isaacs, an oppor-

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122. In Ohio, no "voucher rule" exists, but before counsel may cross-examine his own witness, he must show some grounds therefor. Whether a witness is then declared hostile is within the sound discretion of the trial court. *State v. Parrott*, 27 Ohio St. 2d 205, 272 N.E.2d 112 (1971); *State v. Minneker*, 27 Ohio St. 2d 155, 271 N.E.2d 821 (1971).

123. As this Court noted in *Barber*, at 390 U.S. 724, "the possibility of a refusal is not the equivalent of asking and receiving a rebuff."

tunity which, under these facts, must be held to have satisfied the demands of the confrontation clause.[124]

B. The totality of circumstances under which Anita Isaacs' testimony was taken at the preliminary hearing afforded the jury at Roberts' trial a satisfactory basis for evaluating the truth of her testimony.

It has been well established in previous arguments that the preliminary hearing afforded Herschel Roberts herein was a "full-fledged" judicial hearing of an adversary nature, in which he was present and had every opportunity to cross-examine extensively. Based on the early cases, such would be enough to establish the indicia of reliability necessary for admission of that testimony at trial. And it has been argued that the opportunity to cross-examine at the preliminary hearing met the demands of the confrontation clause.

It has been suggested, however, that the Ohio Supreme Court was not entirely accurate when it concluded that Anita Isaacs was not cross-examined. We now turn to that aspect of the case.

Notable in the testimony[125] is the *absolute absence* of any objection whatever by the prosecutor to any question posed to Miss Isaacs.

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124. Any other rule would lead to the practical result that defense counsel would have every incentive *not* to cross-examine at a preliminary hearing, then hope the witness would not appear at trial. And such a situation would provide criminal defendants with every incentive to make sure witnesses against them would not be available for trial.

125. App. at 16-23.

Also notable in the testimony is that *absolute absence* of any admonition from the bench as to the manner or content of the questions posed.

Roberts' attorney was thus wholly unimpeded in his questioning of Miss Isaacs. As noted earlier,[126] he had obviously discussed the matter in some detail with his client and was prepared to ask her questions regarding his client's purported relationship with her. When he found her account conflicted with his client's, he did not cease his examination but rather continued extensively, and in some detail, to probe what she knew and was prepared to say. Through all of this, neither opposing counsel nor the bench sought to limit him.

Further the transcript itself bears indicia of cross-examination. Throughout the examination, and particularly at crucial questions, Roberts' counsel used leading and argumentative questions, the hallmarks of cross-examination.[127] He ceased asking the cross-examination-

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126. See note 21, at 45 *supra*.

127. At App., at 17, it was asked: "I see. *Now is it a fact* that he has been staying at your place for the last couple, three weeks?" (emphasis added)

Later, at App., 17, the question was posed: "O.K. Now, is it to your knowledge then, that this Mr. Roberts has been staying at your apartment until the present time, from December 30th?"

And see App., at 20, where the question is posed: "Now, since December 24th, isn't it a fact that you have been in your parents' home since that time?"

Later on the same page, it is asked: "Now your parents weren't home at that time; isn't that correct?"

And again on App. 20: "You did not observe any broken doors or windows, or anything taken; is that correct?"

On App. 21, the crucial question in Roberts' entire defense was set forth in language which was at once both argumentative and leading: "Now, is it a fact that you have seen these credit cards since the 23rd of December and isn't it a fact also that you gave these cards to Mr. Roberts?"

type questions not because he was instructed to, but rather because he desired to.

The totality of circumstances, then, are those of a full judicial hearing, with the defendant present, represented by counsel who had every opportunity to develop whatever evidence might be allowed by the rules of evidence, and extensive examination if not cross-examination of a clearly adverse witness who testified under oath.

All of these indicia of reliability, taken together, certainly could and did provide the trier of fact with a substantial basis for evaluating the truth of Anita Isaacs' statements, and Roberts was denied no right of confrontation by the use of her transcribed testimony at trial.

CONCLUSION

The Supreme Court of Ohio erred in ruling that, under the facts herein, the recorded preliminary hearing testimony of Anita Isaacs should not have been used at Roberts' trial. The judgment of that court should be reversed.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1978

No. 78-756

STATE OF OHIO,
Petitioner,
vs.
HERSCHEL ROBERTS,
Respondent.

BRIEF OF RESPONDENT

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Supreme Court of the United States

October Term, 1978

No. 78-756

STATE OF OHIO,
Petitioner,
vs.
HERSCHEL ROBERTS,
Respondent.

BRIEF OF RESPONDENT

QUESTION PRESENTED FOR REVIEW

In a criminal case where a witness testifies at a defendant's preliminary hearing and later is not produced at trial of the same defendant, and the State fails to show that said witness is unavailable and that it made a good-faith effort to secure the presence of the witness at trial, does the admission into evidence of such preliminary hearing testimony, deny the defendant his right to confront this witness under the Sixth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

The facts pertinent to the case at bar are as follows:

The defendant-respondent, Herschel Roberts, was arrested by the Mentor Police Department, in Mentor, Ohio, on January 7, 1975, and charged with forgery.

Shortly after respondent's arrest, a preliminary hearing was held in the Mentor Municipal Court in which the State of Ohio called a number of witnesses. The respondent called only one, Anita Isaacs, whom respondent's former court-appointed counsel observed in the court's hallway. (Anita Isaacs had come with her parents, witnesses for the State of Ohio, on Mr. Isaacs' alleged forged checks.) The witness, to Roberts' surprise, instead of defending him, testified adversely to his defense. At the conclusion of this probable cause hearing, the defendant-respondent, Herschel Roberts, was bound over to the Lake County Grand Jury.

Subsequently, the respondent was indicted on charges of forgery, receiving stolen property, and possession of heroin, and his case set for jury trial. It was at this time that the court-appointed attorney, who had called Anita Isaacs as a defense witness, asked for, and was given permission to withdraw as trial counsel. Marvin R. Plasco, the present attorney herein, was appointed on behalf of the defendant. As a result of this change in trial counsel, a mix-up by the Court in scheduling and other delays, the case was continued several times. Not all these continuances were a result of the defendant's actions.

On March 4, 1976, the jury trial commenced. During said trial and over respondent's objections, the trial court permitted, pursuant to Ohio Revised Code Section 2945.49, the introduction into evidence of the prior recorded testimony of Anita Isaacs from the Mentor Municipal Court.

Prior to the admission of the preliminary hearing testimony of Ms. Anita Isaacs, *counsel for respondent* called Mrs. Amy Isaacs, mother of Ms. Anita Isaacs, for a voir dire examination. During said examination, Mrs. Isaacs

testified that her daughter had been absent from the State of Ohio since the end of January, 1975, less than thirty (30) days after the preliminary hearing in which Anita had testified. Mrs. Isaacs further testified that she had talked twice with her daughter over this (13) month period, and had also talked with her daughter's social worker in San Francisco, California.

In checking the Lake County Clerk of Court's records on the case at bar, additional facts are shown. The case had been set for jury trial on five (5) different occasions, and five (5) subpoenas for Anita Isaacs, all to the same address, were issued. The first two show that returns were made on November 3rd and 4th, 1975 respectively. A third, showing a return of service on December 10, 1975, carried the advice on the subpoena to "please call before appearing" on the date of trial. The fourth and fifth returns, showing service on February 3, 1976 and February 25, 1976, and carry the same instructions. The address on the subpoenas was that of the parents of Ms. Anita Isaacs. All five subpoenas show that service on Anita Isaacs was made.

In contrast to this information, the State of Ohio failed to produce any witness or evidence that: (1) the subpoenaed witness, Ms. Anita Isaacs, never called, (2) the subpoenas were not personally served as the record so indicates, (3) that no one on behalf of the State of Ohio could determine Anita's whereabouts, (4) that no one had exhausted contact with the San Francisco social worker, and (5) the parents of Anita Isaacs stated that no one had left residence service of the subpoena for Anita at their residence.

The defendant-respondent, Herschel Roberts, was found guilty by the jury on all three (3) counts, and

subsequently appealed the convictions to the Eleventh Appellate District Court of Appeals, Lake County, Ohio. The Court of Appeals reversed the judgment of the trial court on the grounds that the admission of the preliminary hearing transcript violated the respondent's Sixth Amendment right to confrontation of witnesses, since the State had failed to show that said witness was unavailable and that it had made a "good-faith" effort to locate her.

After allowing a motion filed by the State of Ohio for leave to appeal, the Ohio Supreme Court affirmed the judgment of the Court of Appeals. The Ohio Supreme Court in affirming the Eleventh Appellate District, held that since the issues of a preliminary hearing versus those of a jury trial in the Common Pleas Court are quite different, the opportunity to cross-examine at the preliminary hearing cannot be said to afford confrontation for the purposes of a jury trial. Therefore, where the witness Anita Isaacs testified against Herchel Roberts at the preliminary and was not cross-examined, and later did not appear at trial, the Sixth Amendment precludes the State's use of the witness's recorded testimony, notwithstanding Ohio Revised Code Section 2945.49.

It is from the judgments of the Ohio Supreme Court and the Court of Appeals, that the State of Ohio sought a writ of certiorari.

SUMMARY OF ARGUMENT

I

In two distinct lines of cases, this Court has considered whether the admission of testimony taken at a preliminary hearing may be admitted into evidence at a jury trial in place of an unavailable witness' personal testimony.

A handful of cases beginning in 1879 concluded that the privilege to confront witnesses at trial was not offended if the defendant caused the witness to be absent. The purpose of the confrontation clause was offended where the state, through negligence or failure to diligently seek the presence of a witness, sought to use prior-recorded testimony because of the witness' unavailability. This Court has found that Common Law, from as early as the *Magna Carta*, has acknowledged the use of extrajudicial statements which are thought to be inherently reliable, such as the "dying declaration." Necessity, which has been called not the need to prosecute but the need to inform the jury, sometimes requires the use of other testimony in absentia. Reliability was the common denominator of all such testimony approved by this Court.

The more modern line of cases has applied the confrontation clause of the Sixth Amendment to the states, and set forth meaningful and workable requirements on the use of transcript testimony as an exception to the clause. The use of an unavailable witness' prior-recorded statements now requires a showing of unavailability. The state bears the burden of proving that it made a diligent attempt to locate and secure such a witness' presence. The sophisticated and wide-reaching resources of the States in the area of law enforcement, requires no less in light of the fact that a Constitutional privilege is being overlooked by the confrontation clause exception.

The requirement of reliability is still retained. The Court has always found the indicia of reliability necessary to allow an exception to the confrontation clause by examining the totality of the circumstances. Never have the form requirements of oath, recording, and a magistrate's direction, imposed by state criminal rules at preliminary hearings, been called sufficient indicia of reliability, standing alone, to justify the recognized exception.

II

Before admitting the preliminary hearing testimony of Anita Isaacs at the trial of Herschel Roberts a voir dire examination of the witness' mother disclosed that Anita's whereabouts were unknown and that she was missing since two weeks after the preliminary hearing. This voir dire was requested by defense counsel. The state was totally unprepared at trial to meet the burden of unavailability. No one from the state testified that any effort was made to find Anita Isaacs and secure her presence at trial. Despite the testimony of the mother that the daughter was missing since January, 1975, the Lake County Clerk of Court records show that five (5) subpoenas to Miss Isaacs prior to trial were all returned as served. Such negligence or lack of diligence by the State cannot support the exception sought by the State at trial.

III

The Ohio Eleventh District Court of Appeals found from the record it received that evidence showed Anita Isaacs was involved with the defendant. That Court further expressed that a lack of candor was shown by the mother's voir dire testimony. These conclusions cast doubt on the reliability of Anita's preliminary hearing testimony. Further doubt is cast by the sudden absence of the witness in light of five (5) subpoenas returned as served. The trappings of a preliminary hearing, standing alone, will not suffice to admit testimony which otherwise bears indicia of *unreliability*.

IV

The present counsel for Herschel Roberts was court-appointed when the case was set for trial. A different attorney represented him at the preliminary hearing, but

withdrew from the case prior to trial. A specific rule fashioned by this Court in *California v. Green* precludes the use of preliminary hearing testimony at trial where different counsel represent a defendant, irrespective of whether cross-examination occurred.

V

The rule which petitioner asks this Court to embrace—that without any other indicia of reliability, the fact that testimony was taken at preliminary hearing justifies admisson as an exception to confrontation clause requirements—would create chaos in courts conducting such hearings. Each and every preliminary hearing would become a drawn-out ordeal where each witness is extensively cross-examined to avoid facing a successful ex parte conviction at trial. The Ohio Supreme Court, and other courts, have properly overruled the use of preliminary hearing testimony at trial where the pro forma nature of the hearing prevents actual or adequate cross-examination, and no independent indicia of reliability exist.

ARGUMENT

I. The Case Law

Although never specifically faced with the question presented herein, the prior decisions of this Court clearly indicate that the decisions of the courts below properly held that respondent was denied his right to confront witnesses at trial, as guaranteed by the Sixth Amendment.

Reynolds v. United States,[1] was one of the earliest cases to consider the use of prior recorded testimony when

1. 98 U.S. 145 (1879).

a witness was unavailable to testify at trial. The absent witness' testimony admitted in *Reynolds* was taken at a former trial of the accused for the same offense, at which the witness was cross-examined. Further, at this second trial, the missing witness was shown to be absent because of procurement or connivance on the part of the defendant. Thus, this Court concluded that the Sixth Amendment "grants . . . the *privilege* of being confronted with the witnesses against him; but if he voluntarily keeps the witness away, he cannot insist on his *privilege*."[2]

In *Mattox v. United States*,[3] the Court allowed the use of prior testimony of two witnesses who died prior to the trial. As in *Reynolds*, the testimony admitted into evidence was recorded at a prior trial of the same charge where full cross-examination was conducted before the jury.[4]

The Court discussed the confrontation clause in *Mattox* in terms apart from *Reynolds*. Whereas *Reynolds* considered only the privilege aspect of confrontation, *Mattox* further developed both the primary purpose of the clause and the manner in which that substance is protected. The Court noted:[5]

> "The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not

2. *Id.*

3. 156 U.S. 237 (1895).

4. Mattox's first conviction was reversed by this Court for other reasons. 146 U.S. 140.

5. 156 U.S. at 242-243.

> only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

The Court pointed out that occasion and necessity might cause exceptions to the rule to be developed, such as the dying declaration, inherited from the English common law long before the Constitution. Other exceptions could be upheld where the "primary object" of testing the witness before the jury, is not foresaken. Thus, the Court found that the admission of prior *trial* testimony of a deceased witness, subjected to full direct and cross-examination, did not forsake the "primary object", the Court stating:[6]

> "The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of. . ."

Motes v. United States,[7] considered whether the Sixth Amendment right to confront witnesses was offended by the admission of examining trial testimony of an absent witness at a final trial, where absence was due to prosecutorial neglect rather than death or conduct of the defendant. In holding that the confrontation clause is offended under circumstances amounting to prosecutorial neglect, this Court adopted the view of Cooley, in his TREATISE ON CONSTITUTIONAL LIMITATIONS, that certain exceptions

6. 156 U.S. at 244.

7. 178 U.S. 458 (1900).

to this general rule shall apply. These exceptions would arise when prior direct examination and cross-examination occurred at an earlier trial, or upon deposition, and "the witness has since deceased, or is insane, or sick and unable to testify, or has been summoned but appears to have been kept away by the opposite party."[8] The Court held that since none of the recognized exceptions applied, that the right to confront witnesses was denied.

In *West v. Louisiana*,[9] a forerunner of *Barber v. Page*,[10] this Court held that the admission of prior testimony taken at a preliminary hearing, and subject to cross-examination, was not a violation of the due process clause. The Court reaffirmed the four exceptions to the confrontation clause adopted by *Motes*. The Court stated:[11]

> "The substantial and fundamental right of confrontation is subject to but four exceptions: First, where the witness is dead; second, where the witness is so ill that it is unlikely that he will ever be able to appear in court; third, where the witness has become insane; fourth, where, through the procurement or connivance of the accused, the witness has been prevented from attending."

In considering other exceptions to the general rule, the Court looked with disdain on less than adequate attempts to procure witnesses. The *West* Court stated:[12]

> "Neither the commentators on the law or evidence, nor the courts called upon to expound it, have shown

8. 178 U.S. at 472.

9. 194 U.S. 258 (1904).

10. 390 U.S. 719 (1968).

11. 194 U.S. at 260.

12. *Id.*

> any inclination to lend a willing ear to the plea of convenience.[12]

The more modern line of cases considering the use of prior recorded testimony as a proper exception to Sixth Amendment constraints began with *Pointer v. Texas*.[13] *Pointer* rejected the trial court's use of a preliminary hearing transcript containing the testimony of a witness who had left the jurisdiction, where it appeared that Pointer was not represented by counsel[14] and he did not cross-examine the absent witness at the preliminary hearing. Today, the *Pointer* decision extends the Sixth Amendment right to confront witnesses to proceedings conducted in the state courts. The Court reaffirmed the exceptions noted in *Motes*, discussed above, and held further, that:[15]

> "the right of an accused to be confronted with the witnesses against him must be determined by the same standards whether the right is denied in a federal or state proceeding."

The Court in *Pointer* did not hold, as petitioner maintains, that the "mere" opportunity for defense counsel to cross-examine the missing witness satisfies the Sixth Amendment guarantees. This Court did say that there must be an "adequate"[16] opportunity for cross-examination to allow admission of preliminary hearing testimony at trial.[17]

13. 380 U.S. 400 (1965).

14. The Court refused to rule on the applicability of *Gideon v. Wainwright*, 372 U.S. 335 (1963), because the Texas "examining trial" appeared substantially different from the traditional preliminary exam wherein pleas are entered and the exam for probable cause is conducted.

15. 380 U.S. at 407, 408.

16. *Id.*

17. Although whether contemporaneous or subsequent cross-examination is required was later addressed in *California v. Green*, 390 U.S. 149 (1970).

In *Barber v. Page*,[18] the Court again considered the burden of unavailability that the prosecution must meet to allow, at trial, the use of testimony taken at a preliminary hearing. Petitioner in *Barber v. Page*, had been convicted on the basis of testimony introduced through the transcript of the preliminary hearing. The witness in question, at the time of trial, was incarcerated in a federal prison in another state. No attempt by the State in *Barber*, as herein, had been made to bring this missing witness to trial. Further, the defendant's counsel had not cross-examined the witness at the earlier preliminary hearing.

In discussing the unavailability aspect of *Barber v. Page*, the Court held that mere absence from the jurisdiction is not enough in view of the increasingly sophisticated methods available to law enforcement and prosecuting agencies.[19] While the prosecution in *Barber* felt that there was a possibility that federal prison officials might refuse to cooperate in making the witness available, this Court relied on the opinion of designated Judge Aldrich, in dissent, below, stating:[20]

> "the possibility of a refusal is not the equivalent of asking and receiving a rebuff."[21]

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18. 390 U.S. 719 (1968).

19. The Court discussed specifically the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings and the common law writ of habeas corpus ad testificandum.

20. 390 U.S. at 724.

21. Likewise, respondent urges that the manner in which the State of Ohio sought to show unavailability, merely by the mother's response that the witness is missing, constituted a complete dearth of effort in terms of the "good-faith" ultimately contemplated by *Barber v. Page*.

Thus, respecting unavailability, this Court concluded:[22]

> "In short, a witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial."

And, respecting the lack of a "good-faith" effort:[23]

> "The right of confrontation may not be dispensed with so lightly."

The exception discussed above, as developed through *Mattox* and *Pointer*, and stated by way of headnote in *Barber*, now requires that cross-examination had occurred at the prior deposition:[24]

> "There is an exception to an accused's constitutional right to be confronted with the witnesses against him where a witness is unavailable and has given testimony at previous judicial proceedings against the same accused which was subject to cross-examination by that accused."

Barber v. Page also recognizes that practical differences between preliminary hearings and full-blown trials must be considered in determining whether cross-examination at a preliminary hearing will satisfy the confrontation clause for the purposes of the "unavailable" exception, stating:[25]

> "The right to confrontation is basically a trial right. It includes both the opportunity to cross-exam-

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22. 390 U.S. at 724-725.

23. *Id.*

24. 390 U.S. 719, headnote #1.

25. 390 U.S. at 725.

> ine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial simply because its function is the more limited one of determining whether probable cau·e exists to hold the accused for trial."

While petitioner maintains that this Court's holding in *Barber v. Page*, respecting use of preliminary hearing testimony of an unavailable witness at a subsequent trial for the same offense, is diluted by the Court's later holding in *California v. Green*,[26] the congruence between the two decisions is highly visible.[27]

Green was convicted at a trial at which the preliminary hearing testimony of a witness, Porter, was introduced to refresh Porter's memory after he became evasive and forgetful while testifying at trial. Porter was in fact cross-examined extensively *at both* the preliminary hearing and the subsequent trial. Further, cross-examination on behalf of Green was conducted by the same attorney at both the preliminary examination and the trial.

Part of the question in *Green* was whether the jury's inability to test the demeanor of the witness at the preliminary hearing deprived Green of his full confrontation rights. This Court properly held that subsequent cross-examination before a jury properly fulfills the objectives of the confrontation clause.

Petitioner herein[28] urges that the following portion of *Green* favors the use of preliminary hearing testimony at

26. 390 U.S. 149 (1970).

27. See Brief of Petitioner, p. 17.

28. Petitioner's brief at pp. 18, 19.

trial in a manner which disregards the constraints of *Barber v. Page*:[29]

> "We also think that Porter's preliminary hearing testimony was admissible as far as the Constitution is concerned wholly apart from the question of whether respondent had an effective opportunity for confrontation at the subsequent trial. For Porter's statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial. Porter was under oath; respondent was represented by counsel—the same counsel in fact who later represented him at the trial; respondent had every opportunity to cross-examine Porter as to his statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings. Under these circumstances, Porter's statement would, we think, have been admissible at trial even in Porter's absence if Porter had been actually unavailable, despite good-faith efforts of the State to produce him. That being the case, we do not think a different result should follow where the witness is actually produced."

The consistency with *Barber* is abundantly evident. The Court hypothesized that the question could be answered in terms of *Barber* apart from whether the trial itself occasioned effective cross-examination. The *Barber* requirements *could* be met because extensive cross-examination in fact occurred at the preliminary examination, conducted by the *same* counsel, *if* the witness were unavailable and a "good-faith effort" made by the State to produce the witness was unsuccessful.

29. 399 U.S. at 165.

Since the privilege of confrontation would not be offended if the witness were absent, his presence at trial, guaranteeing additional subsequent cross-examination, certainly would not offend the privilege in light of the earlier case.

Green further holds that preliminary hearing testimony is admissible at a trial regardless of the effectiveness of the cross-examination at the preliminary hearing if four requirements are met. These requirements are:[30]

(1) the declarant was under oath at the preliminary hearing;

(2) the accused was represented at the preliminary hearing by the same counsel who later represented him at trial;

(3) the accused had every opportunity at the preliminary hearing to cross-examine the declarant as to his statement;

and,

(4) the proceedings at the preliminary hearing were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings.

The vitality of the foregoing has never been questioned. Respondent urges that this holding is completely dispositive of the confrontation issue herein since Herschel Roberts was represented at the preliminary hearing by another court appointed attorney. The present attorney for Respondent, Marvin R. Plasco, has represented Roberts since the date that the trial was set in the Lake County Common Pleas Court, at which time prior counsel withdrew and Plasco was appointed to represent the indigent defendant.

30. 26 L. Ed. 2d 491, headnote 6.

The State of Ohio erred in its analysis of *Green* in one further respect. Petitioner maintains that *Green* "categorized the preliminary hearing as indicia of reliability" which support the use of testimony taken therein at a subsequent trial.[31] On the contrary, *Green* emphasized that traditional evidentiary indicia of reliability must be scrutinized before any hearsay evidence is admitted. Although procedural safeguards may tend to favor reliability, according to Justice Brennan:[32]

> "The reliability of pretrial testimony. . . is not determined simply by the circumstances under which it was given."

Justice Brennan stated the need to scrutinize "subsequent developments", or those events which occur after a preliminary examination but before the trial. Among these developments is an unwillingness to testify.[33] In concluding that unwillingness to testify casts serious doubts on the reliability of prior testimony, Justice Brennan stated:

> "Reliability cannot be assumed simply because a prior statement was made at a preliminary hearing."[34]

This Court has during the past decade decided two other cases raising the issue of confrontation under the Sixth Amendment. In *Dutton v. Evans*,[35] a co-defendant's post-arrest statement was held admissible despite the fact that there had been no actual confrontation because the statement possessed sufficient "indicia of reliability."

31. This contention appears at petitioner's brief, page 25.

32. Dissent of Justice Brennan, 390 U.S. at 201-202.

33. Although Justice Brennan discussed both unavailability and unwillingness to testify, respondent maintains that personal motives may cause an overlap, where, as herein, Anita Isaacs became unavailable because of her unwillingness to testify at trial.

34. 390 U.S. at 202.

35. 400 U.S. 74 (1970).

However, *Dutton* is not significant since said testimony was admitted on the basis of a Georgia statute allowing admission of a co-defendant's statement against other defendants. Further, the statement did not "involve evidence in any sense crucial or devastating"[36] since more than twenty (20) prosecution witnesses appeared and testified for the State against Evans, and therefore, the triers of the fact (jurors) had a satisfactory basis for evaluating the truth of the prior statement.[37]

In *Mancusi v. Stubbs*,[38] the defendant Stubbs was convicted when the transcript of an important prosecution witness's testimony was introduced during a retrial of the defendant.[39] In upholding the second conviction, this Court stated that more than ten (10) years had lapsed between the first and second trials, and the witness had since permanently moved to Sweden and was thus unavailable to testify at the second trial.[40] Further, this Court held that the first trial was before a jury where the defendant's counsel had cross-examined the witness and that "the trier of the fact (had) a satisfactory basis for evaluating the truth of the prior statement."[41] Thus, "before it can be said that an accused's constitutional right to confront witnesses was not infringed at the accused's second trial, the adequacy of the examination of the witness at the accused's first trial must be taken into consideration. . ."[42]

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36. *Id.* at 226.

37. 408 U.S. 204 (1972).

38. 408 U.S. 204 (1972).

39. The first trial resulted in a conviction which was overturned in federal habeas corpus proceedings.

40. The witness's son testified in the second trial that his father had become a resident of Sweden during this period between the first and second trials.

41. *Id.* at 303.

42. *Id.* at 301.

II. Petitioner Failed to Show That Anita Isaacs Was Unavailable and That It Made a Good-Faith Effort to Locate Her

As early as *Motes v. U.S.*[43], this Court held that the right of an accused under the United States Constitution, Sixth Amendment, to be confronted with witnesses against him is violated by permitting the statement of an absent witness taken at an earlier trial or hearing to be admitted in a later trial, when it does not appear that the witness was absent by suggestion, connivance or procurement of the accused, but, it does appear that his absence was due to the *negligence* of the prosecution.

The landmark case of *Barber v. Page* placed upon the State the burden that to show unavailability,[44] they must also show a "good-faith" effort to locate the absent witness. What constitutes a good-faith effort by the prosecutorial authorities to secure the witness's presence at trial is necessarily a factual question which must be determined in light of the circumstances in each case. *Eastham v. Johnson.*[45] To show this good-faith effort, the State must do more than just suggest or show that the absent witness is out of the jurisdiction of the State where the defendant is being tried.[46] Minimally, a good-faith effort would require the State to prove that they have conducted a diligent search of the witness. *Holman v. Washington.*[47]

In the case at bar, respondent was convicted after the trial court admitted over his objections, the prior recorded preliminary hearing testimony of Anita Isaacs. The only

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43. *Supra* at 473.

44. *Supra.*

45. 338 F. Supp. 1278 (E.D. Mich. 1972).

46. *Barber v. Page, supra.*

47. 364 F.2d 618, 623 (5th Cir. 1966).

evidence of the unavailability of Anita came as a result of a voir dire examination of Mrs. Amy Isaacs, one of the State's witnesses, *requested by counsel for respondent.*

The respondent was subsequently convicted and appealed to the Eleventh District Court of Appeals, Lake County, Ohio. The Court of Appeals reversed respondent's convictions relying upon *Barber v. Page,*[48] holding that the admission of the preliminary hearing testimony violated respondent's right to confront witnesses against him because the State of Ohio did not clearly show to the Court that the witness was unavailable, nor had the State made a good-faith effort to secure her presence at the trial below.

The Ohio Supreme Court, after granting the State's motion for leave to appeal, affirmed the reversal of the convictions. The Ohio Court, after review of *Barber v. Page*[49] and *California v. Green,*[50] affirmed, but concluded that the proof of unavailability required by *Barber* was satisfied at the trial court below. In so holding, the Ohio Court stated that:

> ". . . the trial judge could reasonably have concluded from Mrs. Isaacs' *voir dire* testimony that due diligence could not have procured the attendance of Anita Isaacs."

This is contrary to this Court's holding in *Barber v. Page*[51] which stated:

> "The possibility of a refusal is not the equivalent of asking and receiving a rebuff."[52]

48. *Supra.*
49. *Supra.*
50. *Supra.*
51. *Supra.*
52. 390 U.S. at 724.

Further, the United States Court of Appeals for the District of Columbia has held that such a search (for an absent witness) must be equally as vigorous as that which the State would undertake to find a critical witness if it has no preliminary hearing testimony upon which to rely.[53]

Application of these principles to the facts at bar illustrate that on five (5) different occasions, five (5) subpoenas for Anita Isaacs, all to the same address, were issued. The first two show that returns were made on November 3rd and 4th, 1975, respectively. A third, showing a return of service on December 10, 1975, carried the advice on the subpoena to "please call before appearing" on the date of trial. The fourth and fifth returns, showing service on February 3, 1976 and February 25, 1976, carry the same instructions. The address on the subpoenas was that of the parents of Miss Anita Isaacs. All five subpoenas show that service on Anita Isaacs was made.

In addition to the issuance of five (5) subpoenas with service upon Anita Isaacs, there is the voir dire testimony of Mrs. Isaacs that she had talked with her daughter as well as the daughter's alleged social worker in San Francisco, California.

If Anita Isaacs were truly unavailable, why did not the prosecution introduce evidence that Anita no longer was a resident of the jurisdiction? Why did not Anita's parents, victims as to the crime that respondent was charged with, call and complain about the five (5) different subpoenas? The Court of Appeals, in following *Barber v. Page,*[54] held in their opinion, that no other evi-

53. *United States v. Lynch,* 499 F.2d 1011 (D.C. Cir. 1974).
54. *Supra.*

dence was offered other than the uncorroborated testimony of Mrs. Amy Isaacs, one of the victims. Further, respondent's counsel had to ask for and conduct the voir dire examination; why did not the State's attorney request a voir dire of Mr. and Mrs. Isaacs? The State failed to even attempt to carry this burden.

Respondent's contention is that the State of Ohio was negligent, just as in *Barber v. Page*;[55] that they failed to make a good-faith effort to locate or look for the witness since they had a preliminary hearing transcript and it was not necessary to bother further. Therefore, the Ohio Supreme Court's finding that the witness was unavailable is incorrect since there exists not a shred of evidence other than the voir dire conducted by respondent's counsel as to Anita's whereabouts. Further, the local authorities' negligence or failure to make this good-faith effort to locate Anita denies respondent his right to confront this vital witness.

III. The Preliminary Hearing Testimony of Anita Isaacs Lacked the Indicia of Reliability Necessary for Admission As an Exception to the Confrontation Rule

Since the holding of this Court in *Mancusi v. Stubbs*, the mere demonstration that a witness is unavailable despite "good-faith" efforts to secure her attendance is no longer sufficient to permit the use of prior-recorded testimony. The testimony in question must also bear sufficient indicia of reliability if it is to be admitted.

A review of various factors which bear on the question of the reliability of this witness' testimony clearly demonstrates that the indicia of reliability necessary to

55. *Supra.*

admit the transcript in the witness' absence are completely lacking herein.

Herschel Roberts' theory of defense at each and every proceeding pertaining to the single count of forgery was that Anita Isaacs, the missing witness, gave him the checks and credit cards of her parents, the complaining witnesses.

Because Roberts' attorney at the preliminary hearing was aware of this fact, he called Anita Isaacs with the remote hope that her testimony would exculpate Roberts and prevent subsequent consideration by the grand jury. Roberts' court appointed counsel did not subpoena Anita Isaacs for this purpose. Rather, Anita Isaacs was spotted by defense counsel in the court lobby, having come to the hearing with her parents. The testimony elicited on direct did not exculpate Roberts.

Mancusi, Green and *Evans* all suggest that reliability of testimony is assured where actual and adequate cross-examination occur. Indeed, in *Green*, the witness, Porter, was cross-examined extensively at both the preliminary hearing and at the trial with respect to the transcribed testimony in question. Thus, reliability was well assured in *Green*. In *Dutton v. Evans* reliability was assured because the trier of fact could weigh the co-conspirator's out of court statement against the in-court testimony of more than twenty (20) other prosecution witnesses, including eyewitness accounts.

In *Mancusi*, reliability of an unavailable witness was founded on the fact that the testimony was taken at a former trial, where it was previously weighed by a jury. *Mancusi* concluded in weighing reliability that "the adequacy of the examination of the witness at the accused's first trial must be taken into consideration . . ."[56] Thus

56. 408 U.S. 24.

Mancusi militates against the State's conclusion that the mere opportunity to cross-examine the absent witness at the preliminary hearing, *standing alone,* provides an adequate indicium of reliability for the purposes of meeting the accepted confrontation clause exception.[57]

There is nothing to indicate that any cross-examination of Anita Isaacs took place. The courts below both concluded that no cross-examination occurred. Where no cross-examination occurs at the prior hearing the adequacy standard remains unfulfilled.

Other opinions of this Court indicate that the fact that testimony occurred at a preliminary examination, standing alone, is an unlikely barometer of reliability. Justice Brennan, in *Green,* dissenting opinion, stated:[58]

> "It appears, then, that in terms of the purposes of the Confrontation Clause, an equation of face-to-face encounter at the preliminary hearing with confrontation at trial must rest largely on the fact that the witness testified at the hearing under oath, subject to the penalty for perjury, and in a courtroom atmosphere. These factors are not insignificant, but by themselves they fall far short of satisfying the demands of constitutional confrontation. Moreover, the atmosphere and stakes are different in the two proceedings. In the hurried, somewhat pro forma context of the average preliminary hearing, a witness may be more careless in his testimony than in the more measured and searching atmosphere of a trial. Similarly, a man willing to perjure himself when the consequences are simply that the accused will stand trial may be less willing to do so when his lies may condemn the defendant to

57. This contention is stated at page 35 of Petitioner's brief.

58. 390 U.S. at 198-199.

> loss of liberty. In short, it ignores reality to assume that the purposes of the Confrontation Clause are met during a preliminary hearing. Accordingly, to introduce preliminary hearing testimony for the truth of the facts asserted, when the witness is in court and either unwilling or unable to testify regarding the pertinent events, denies the accused his Sixth Amendment right to grapple effectively with incriminating evidence."

Indeed, the Ohio Supreme Court agrees that the Ohio preliminary exam is the type of pro forma hearing where only a fool would attempt to conduct extensive cross-examination.[59] Both the Ohio Supreme Court and the authority on which it relies,[60] emphasize the importance of deciding the issue in practical rather than esoteric terms. Ignoring the reality of the scope of a preliminary hearing in reaching a rule could lead ultimately to greater court congestion by requiring preliminary hearings to be conducted with the same exactitude as a trial. The difference between probable cause and guilt beyond a reasonable doubt should prevent such a result. So also should the fact that no discovery is available prior to a preliminary hearing militate against requiring the accomplishment of extensive cross-examination of every preliminary witness simply to prevent future prejudice.[61] Without discovery prior to the preliminary hearing due process arguments must be raised, focusing on the inability to prepare at such a crucial point.[62]

59. See Opinion of Ohio Supreme Court, Petitioner Brief for Cert., pp. 20-23.

60. *Government of the Virgin Islands v. Aquino* (3rd Cir. 1367), 378 F.2d 540, 549.

61. Thus, the mere "notice of such statute" rule of *Havey v. Kropp,* 458 F.2d 1054 (6th Cir. 1972), seems overly harsh. Further, adoption of such rule will create a flood of litigation respecting the due process aspects of such a use of testimony, perhaps welcomed by Justice Harlan.

62. *Id.*

A. Subsequent developments cast doubt on the reliability of preliminary hearing testimony of Anita Isaacs

A look at developments subsequent to the preliminary hearing, but before the trial, casts grave doubts on the reliability of Anita Isaacs as a witness. The preliminary hearing took place on January 10, 1975. Before the end of January, 1975, Anita Isaacs disappeared from the area.

This respondent has suggested at each appellate level that the witness absented herself from the area to avoid either perjuring or incriminating herself at later proceedings. Indeed the Ohio Eleventh District Court of Appeals concluded from the transcript of the preliminary hearing, the trial, and the voir dire examination of Mrs. Isaacs, that cross-examination at trial demonstrated Anita Isaacs' involvement with Roberts and that Mrs. Isaacs was less than candid in providing information as to her whereabouts.[63]

The voir dire testimony of Mrs. Isaacs, mother of the missing witness, when compared to dates of service on state subponeas, further indicates that the reliability of the missing witness' testimony was highly suspicious.

The only address by which the State could reach Anita Isaacs was the same as that of her parents. Also of great importance is the fact that Mr. and Mrs. Isaacs were the victims and complaining witnesses at the trial. As noted earlier, five (5) subpoenas to the residence to produce Anita Isaacs were returned as served. The first two of these were returned November 3rd and 4th, 1975. According to Mrs. Isaacs, on voir dire conducted on the second day of trial, at defense counsel's request, Anita had been absent from the area since immediately after the preliminary hearing. Yet, Mrs. Isaacs never told the State that

63. See Court of Appeals Opinion, Appendix of Petitioner.

this important witness was missing, nor gave anyone any indication that the service of the subpoenas was not successful. The third subpoena, served on December 10, 1975, produced the same result: no indication of the witness' absence or further information. The final two subpoenas, returned on February 3rd and 25th, 1976, show the same result: no indication of the witness' absence or further information.

The blatant contradiction between the information available at the Lake County Clerk of Court's office regarding the subpoenas and the voir dire testimony of the witness' mother casts grave doubts on the reliability of the prior-recorded testimony.[64]

IV. California v. Green Precludes the Use of Preliminary Hearing Testimony Where Different Counsel Represent Defendant at Trial

In *California v. Green* the Court looked strongly on the fact that Green had the same counsel at both proceedings. Although *Green* did not raise the question of whether unavailability of the witness would create a different result, the Court did hypothesize that if unavailability was properly demonstrated, the testimony would still be admissible at trial, even absent effective cross-examination. By the way of headnote,[65] this Court held that preliminary hearing testimony of an unavailable witness may be used *if* unavailability is shown and four (4) requirements are

64. The reliability of Mrs. Isaacs' statements on voir dire is also questionable, the state having failed to corroborate the story of Anita's absence in any manner whatsoever, even whether Anita in fact had a California based social worker. See argument at II.

65. 25 L. Ed. 2d 491, n.6.

met, including representation by the same counsel at both proceedings. This rule in *Green* was stated thusly:

> "Under the confrontation clause of the Federal Constitution, preliminary hearing testimony is admissible regardless of whether the accused has an effective opportunity at his subsequent state criminal trial to confront the declarant who gave such testimony, where (1) the declarant was under oath at the preliminary hearing, (2) *the accused was represented at the preliminary hearing by the same counsel who later represented him at the trial,* (3) the accused had every opportunity at the preliminary hearing to cross-examine the declarant as to his statement, and (4) the proceedings at the preliminary hearing were conducted before a judicial tribunal, equipped to provide a judicial record of the hearing . . ." (emphasis supplied)

The cases which followed *Green* have not disturbed, or even discussed this holding. At the preliminary examination, Roberts was not represented by the same attorney who represented him at all subsequent proceedings.[66]

This rule in *Green,* then, should conclusively bar the use of preliminary examination testimony at the trial herein, where the defendant was given a new court-appointed attorney shortly before the trial.

V. Adoption of Petitioner's Rule Would Result in Manifest Impracticality at the Municipal Court Level

As several courts have pointed out, equating cross-examination at a preliminary hearing with cross-examination at trial ignores the reality of the preliminary hearing on a practical level. Adoption of petitioner's rule that

66. Thus, the "fishing expedition" comment of the trial judge, at Petitioner's Appendix, p. 14, seems extremely inappropriate.

the "mere opportunity" to cross-examine any person at a preliminary hearing satisfies the confrontation clause would create a landmark decision which would again revolutionize the area of criminal procedure. The practical end result would be the creation of some type of "committing" court which could adequately accommodate week-long or month-long preliminary hearings at which a searching cross-examination of all witnesses could be undertaken, merely to protect from future unforeseen confrontation issues.

In the instant case, petitioner's assertion would require that once confronted with adverse testimony on direct examination, counsel must declare the witness hostile in order to conduct cross-examination. Voucher rules notwithstanding, to extend such a rule to criminal preliminary examinations is ludicrous. Not only would defense attorney have to cross-examine, but before so doing, or contemporaneously with such cross-examination, defense counsel would have to conduct the type of direct examination which the prosecution is responsible to develop. It is difficult to see how a defense attorney could fulfill his ethical obligations to his client by developing the case against his client as a gratuity to the state.[67]

The pro forma nature of the preliminary hearing in most, if not all, jurisdictions developed from the practical realities of the day-to-day regimen of courts impressed with the responsibility of directing such proceedings. In spite of petitioner's illusions and allusions that the Ohio

67. Indeed, Roberts' counsel at the preliminary hearing may have been limited by the privileged nature of the information needed to impeach Miss Isaacs, with whom he had an intimate personal relationship which she obviously tried to hide. Only her admission that this "acquaintance" borrowed her car for days at a time alludes to this fact, although the Court of Appeals found other evidence within the trial transcripts. See Petitioner's Appendix, p. 5.

criminal rules permit unimpeded cross-examination, attorneys familiar with a particular court know the limits and interests of the bench in conducting preliminary hearings. The Ohio Supreme Court agreed in the opinion below that few rights are, or can be, adamantly protected at a preliminary hearing, as at a trial. Indeed, although no comment appears on the transcript that time was a factor, who knows whether the judge pointed at his watch indignantly, or suggested in chambers that the proceedings should be brief?

Respondent's prior attorney was familiar with the Mentor Municipal Court, and doubtless shaped his preliminary hearing presentation to conform with that court's expectations or accepted practices.[68]

It is infinitely more practical in the long run for this Court to impress on prosecutors the need to exert all due diligence in procuring a witness, or demonstrate such diligence to support the unavailability exception, than it is to fashion a rule which will revolutionize criminal procedure so that defense attorneys may protect the public from the fear of conviction by ex parte affidavits.

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68. In larger Ohio counties, notably Cuyahoga, preliminary hearings are informally conducted at the bench. Thus, the per se indicia of reliability of oath, magistrate's presence and presence of counsel are not firmly impressed enough to constitute actual indicia of reliability in the final analysis for the purpose of supporting an exception to the confrontation clause constraints.

CONCLUSION

The Supreme Court of Ohio properly held that Herschel Roberts was denied the right to confront a witness by the use of transcript testimony of an absent and uncross-examined witness. This Court is asked to overrule the Ohio Supreme Court in its finding that the State properly demonstrated that it used due diligence and a good-faith effort to locate the witness as required by this Court in *Barber v. Page*. The judgment should be affirmed.

Respectfully submitted,

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No. 78-756

In the Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF OHIO, PETITIONER

v.

HERSCHEL ROBERTS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INTEREST OF THE UNITED STATES

This case presents an important question regarding the circumstances in which the Confrontation Clause of the Sixth Amendment permits the introduction of the prior recorded testimony of an unavailable witness. Although this is a state prosecution and the prior testimony was admitted pursuant to a state statute, prior testimony of witnesses who subsequently become unavailable is admitted in a substantial number of federal prosecutions pursuant to Fed. R. Evid. 804(b)(1). Given

the same circumstances, we believe the disputed testimony in this case would have been admissible in a federal prosecution under Rule 804(b)(1), which creates an exception to the hearsay rule for the prior testimony of an unavailable witness if the defendant "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination" at the prior proceeding. A ruling in favor of respondent would substantially impugn the constitutionality of the federal rule. Accordingly, the United States has a substantial interest in the resolution of the question whether the Confrontation Clause was violated by the introduction of this testimony.

QUESTION PRESENTED

Whether respondent's Sixth Amendment right to confront the witnesses against him was violated by the introduction of the prior testimony of an unavailable witness whom respondent had called and questioned extensively at his preliminary hearing.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *.

Ohio Rev. Code Ann. §2945.49 (Page 1953) provides:

> Testimony taken at an examination or a preliminary hearing at which the defendant is present, or at a former trial of the cause, or taken by deposition at the instance of the defendant or the state, may be used whenever the witness giving such testimony dies, or cannot for any reason be produced at the trial, or whenever the witness has, since giving such testimony, become incapacitated to testify. If such former testimony is contained within a bill of exceptions, or authenticated transcript of such testimony, it shall be proven by the bill of exceptions, or transcript, otherwise by other testimony.

Fed. R. Evid. 804(b)(1) provides:

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

STATEMENT

1. In January of 1975 respondent was arrested by the local police in Lake County, Ohio, and charged with forgery of a check and receipt of a number of stolen credit cards belonging to Bernard and Amy Isaacs (Pet. App. 15).

At his preliminary hearing in the Mentor Municipal Court, respondent offered the testimony of the Isaacs' daughter, Anita, to substantiate his claim that Anita had allowed him to use the credit cards. Anita Isaacs testified that she was acquainted with respondent and that she had allowed him to stay at her apartment in late December 1974, while she was away (Tr. 282-283). She also admitted that she had been allowed to use certain of her parents' credit cards on occasion (Tr. 284). But instead of corroborating respondent's claim that she had given him permission to use her parents' credit cards, Isaacs denied that she had given respondent any

of the cards and insisted that she had never used or even seen several of the credit cards that had been stolen (Tr. 285–286, 288–289). Respondent's attorney asked a number of leading questions that suggested that Isaacs had given Roberts her parents' credit cards in order to help pay for a television set, but she persisted in her denial (Tr. 289–291). Defense counsel did not ask the court to declare Isaacs a hostile witness so that he could formally cross-examine her, and the State did not question her (see Tr. 292).

The grand jury subsequently indicted respondent for forgery and receipt of stolen property (Pet. App. 16). These charges were consolidated for trial with a second indictment charging respondent with receiving and concealing other stolen property belonging to Mr. and Mrs. Isaacs, and with possession of heroin (*ibid.*).

2. The case was continued numerous times; it finally went to trial before a jury in early March of 1976. The State's evidence established that respondent had been apprehended at a shopping mall where he had attempted to use Bernard Isaacs' credit card to purchase a camera and to use a check signed "Bernard Isaacs" to buy a diamond pendant (Tr. 29–31, 50–60). At the time of his arrest, respondent identified himself as Bernard Isaacs and produced identification in Isaacs' name (Tr. 79–80). A search incident to respondent's arrest revealed that he was carrying a small silver chalice in his pocket; the chalice was later identified as one that had been stolen from the Isaacs' home (Tr. 84–85). After respondent's arrest, a warrant was issued authorizing a search of his automobile, and the officers executing the warrant discovered heroin and other items stolen from the Isaacs' home (Tr. 130–138, 144–145, 158–159).

Respondent testified in his own defense. He stated that he had been living with Anita Isaacs, that Isaacs had her parents' permission to use their credit cards and her father's checks, and that she had given him permission to use them (Tr. 228–232). Respondent

stated that the check was already signed when he received it (Tr. 232).

On rebuttal, the State offered a certified transcript of Isaacs' preliminary hearing testimony pursuant to Ohio Rev. Code Ann. §2945.49 (Page 1953), which permits the introduction of the prior testimony of a witness who is unavailable at the time of trial (Tr. 273–274). Between the issuance of the indictment and the time of trial, the court had issued five subpoenas to Isaacs at her parents' address (Pet. App. 16). Isaacs never responded, and she did not appear at the trial (*id.* at 17). Mrs. Isaacs testified on voir dire that approximately 13 months before the trial Anita had left home, saying that she intended to go to Tucson, Arizona (A. 8). Mrs. Isaacs stated (*id.* at 8–9, 11) that she did not know where Anita was living, and that since the time Anita left, her family had heard from her only twice, most recently during the summer of 1975 when Anita called home, saying only that she was travelling somewhere outside of Ohio.[1] Neither Mrs. Isaacs nor any other member of the family had received any communication from Anita since then and they had no other information as to her whereabouts (*id.* at 8–11).

Respondent objected to the admission of the transcript on the ground that it would violate his right to confront the witnesses against him, and also on the ground that it was not proper rebuttal (A. 12–14). The trial court overruled these objections and admitted the transcript (*id.* at 14).

Respondent was convicted on all counts. He was sentenced to concurrent terms of one to five years' imprisonment for possession of heroin, two to five years' im-

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[1] Mrs. Isaacs also stated that in April or May of 1975, the Isaacs had received a form from San Francisco County stating that Anita had applied for welfare and asking for certain information (A. 10–11). The Isaacs had located Anita at that time through the social worker assigned to her case in San Francisco, and spoke to her once.

prisonment for receipt of stolen property, and to a consecutive term of 18 months to five years' imprisonment for forgery. All of these sentences were to be consecutive with other state sentences respondent was already serving.

3. The Court of Appeals for Lake County reversed respondent's conviction, holding that the admission of Anita Isaacs' preliminary hearing testimony violated petitioner's right to confront the witnesses against him because the State had not made a sufficient showing that Isaacs was not available at the time of trial (A. 5).

The Ohio Supreme Court granted the State's motion for leave to appeal. It upheld the reversal of the conviction, with three justices dissenting (Pet. App. 15–26). The majority disagreed, however, with the lower court's conclusion that the State had failed to show a good faith effort to produce Isaacs at trial,[2] and it held that Section 2945.49 is applicable where, as here, a witness has disappeared (*id.* at 19–20).

Since Isaacs was unavailable at the time of trial, the majority ruled (Pet. App. 20) that her prior testimony would be admissible, but "only if the testimony was given subject to cross-examination by the defendant in a judicial proceeding concerning substantially the same

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[2]The court concluded (Pet. App. 20):

> We hold that in the present cause, the trial judge could reasonably have concluded from Mrs. Isaacs' *voir dire* testimony that due diligence could not have procured the attendance of Anita Isaacs. The last definite word of Anita's whereabouts was that she was in San Francisco in April or May of 1974. Later, her parents learned that she was "traveling" somewhere outside Ohio. From this the trial judge could reasonably infer that Anita had left San Francisco, and that it would have been fruitless for the prosecution to have contacted the San Francisco social worker in order to locate Anita. Therefore, the trial judge could properly hold that the witness was unavailable to testify in person.

issues." Here, although the basic factual issues were the same at the preliminary hearing and the trial, the court concluded (*id.* at 21) that the "ultimate factual issues" were "quite different." The ultimate issue at the preliminary hearing is whether there is probable cause, whereas at trial the issue is whether the defendant's guilt has been proved beyond a reasonable doubt. This "difference in the ultimate object of proof," the court concluded (*ibid.*), "makes a great difference in the defense attorney's strategy." Because "the restriction of the factual issue at preliminary hearing restricts the scope of cross-examination which defense counsel can prudently conduct," the court held (*id.* at 22) that

> the mere opportunity to cross-examine at the preliminary hearing can not be said to afford confrontation for purposes of the trial. * * * [W]here a witness, who testified against the defendant at preliminary hearing and was not cross-examined is later unavailable to testify at the trial, the Sixth Amendment precludes the state's use of the witness' recorded testimony, notwithstanding R.C. 2945.49.

The Ohio court held (Pet. App. 22) that the case was governed by *Barber* v. *Page*, 390 U.S. 719 (1968), where the admission of recorded preliminary hearing testimony of a witness who was not produced at trial was held to violate the Confrontation Clause. In this case, as in *Barber*, the court reasoned (Pet. App. 22), the defendant's failure to cross-examine the witness at the preliminary hearing did not constitute a knowing and intentional relinquishment of his right to confront the witness at trial. The Ohio court concluded (*id.* at 23) that "[t]he later case of *California* v. *Green*, [399 U.S. 149 (1970)], does not hold otherwise." *Green* involved the admission of a witness's preliminary hearing testimony when the witness testified at trial and was available for cross-examination. Accordingly, the Ohio Supreme Court held (Pet. App. 23) that this Court's

statement that the opportunity for cross-examination at the preliminary hearing alone satisfied the Confrontation Clause was mere dictum. Moreover, the court pointed out (*id.* at 24) that even this dictum must be interpreted in light of the fact that the preliminary hearing in *Green* was "quite atypical" in that the witness was cross-examined extensively. Accordingly, the Ohio court concluded that *Green* "goes no further than to suggest that cross-examination actually conducted at preliminary hearing *may* afford adequate confrontation for purposes of a later trial" (*ibid.*; emphasis in original).

Justice Celebrezze's dissent stated (Pet. App. 26):

> In my opinion, the Sixth Amendment to the United States Constitution does not prohibit, under the facts of the instant case, the admission in evidence of the witness' recorded testimony. As was stated in *United States* v. *Allen* * * * 409 F.2d 611, 613, " * * * the test is the opportunity for full and [fair] cross-examination rather than the use which is made of that opportunity. * * * The extent of cross-examination, whether at a preliminary hearing or at a trial, is a trial tactic. The manner of use of that trial tactic does not create a constitutional right."

SUMMARY OF ARGUMENT

I

Respondent examined Anita Isaacs extensively after calling her as a witness at his preliminary hearing, but he did not formally cross-examine her. The principal question posed by this case is whether this direct examination should be treated as the equivalent of cross-examination for purposes of the Confrontation Clause. If so, this case falls comfortably within a long line of decisions recognizing that there is an exception

to the rule of literal confrontation at trial when a witness is unavailable and the prosecution introduces the recorded testimony of the witness at a prior judicial proceeding against the same defendant, which was subject at that time to cross-examination by the defendant.

Direct examination under modern procedural rules can serve the same function as cross-examination. The voucher rule has now been abandoned in the federal system and in many states. Thus, the defendant can use the traditional techniques of cross-examination—such as leading questions—to impeach his own witness if the witness surprises him with adverse testimony or proves to be hostile, biased against the defendant, or unwilling to testify.

The preliminary hearing transcript in this case demonstrates that where these flexible techniques are available, direct examination affords the same opportunity for confrontation as cross-examination. As a technical matter, respondent conducted only a direct examination of Anita Isaacs. But from the point—early in Isaacs' testimony—when it became clear that she was contradicting rather than corroborating respondent's story, the form and tenor of the questioning were identical to the cross-examination one would expect in the same circumstances.

Respondent's direct examination was the substantial equivalent of cross-examination at trial. No restriction was imposed on respondent's detailed questioning. The State did not object to and the trial court did not restrain respondent's use of many leading questions. Respondent explored the details of Isaacs' relationship with respondent, her version of the events in question, and her possible motive for allowing respondent to use her parents' credit cards and checks. Respondent has never suggested any other line of questioning he wished to pursue at trial, and we know of none. Respondent's examination of Isaacs differed from cross-examination

in name only, and it gave him the same opportunity to confront her and to probe the reliability of her adverse testimony.

II

Since respondent's examination of Isaacs at the preliminary hearing was the equivalent of cross-examination, this case is governed by *California* v. *Green*, 399 U.S. 149 (1970), which establishes that there has been substantial compliance with the Confrontation Clause when the accused has conducted a thorough examination of a witness at his preliminary hearing. As this Court pointed out in *Green*, the conditions of the preliminary hearing closely approximate those at the typical trial: Isaacs was under oath, respondent was represented by counsel, he had every opportunity to examine Isaacs, and the proceedings were conducted before a judicial tribunal equipped to record the proceedings. Here, as in *Green*, the opportunity to examine Isaacs under these trial-type conditions allowed respondent to test Isaacs' recollection and sift her conscience so that the trier of fact would have a satisfactory basis for evaluating the truth of her statements. This provided substantial compliance with the purposes of the confrontation requirement.

In cases in which the defendant was afforded an opportunity to examine a witness who testified at his preliminary hearing but failed to do so, or did so only in a perfunctory manner, the question whether there has been substantial compliance with the Confrontation Clause may be more difficult. As the Ohio Supreme Court pointed out, the issue at the preliminary hearing is restricted to probable cause, and either practical or strategic considerations often cause a defendant to limit or forego cross-examination of the prosecution's witnesses. But in this case, as in *Green*, the defendant did avail himself of the opportunity to confront the witness; accordingly, the Confrontation Clause has been satisfied.

ARGUMENT

I. WHEN A WITNESS IS UNAVAILABLE AT THE TIME OF TRIAL, THE ADMISSION OF HIS PRIOR RECORDED TESTIMONY DOES NOT VIOLATE THE CONFRONTATION CLAUSE IF THE DEFENDANT HAD AN ADEQUATE OPPORTUNITY TO CROSS-EXAMINE HIM

The Confrontation Clause was adopted as a reaction to "the practice of trying defendants on 'evidence' which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact." *California* v. *Green*, 399 U.S. 149, 156 (1970). It guarantees the defendant "an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox* v. *United States*, 156 U.S. 237, 242–243 (1895). The mission of the confrontation requirement is "to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'" *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970), quoting *California* v. *Green*, *supra*, 399 U.S. at 161. See *Parker* v. *Randolph*, No. 78–99 (May 29, 1979), slip op. 10.

Even though the right protected by the Confrontation Clause is "basically a trial right," this Court has traditionally recognized "an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that defendant." *Barber* v. *Page*, 390 U.S. 719, 722, 725 (1968). This exception to the rule of literal confrontation at trial "aris[es] from necessity" and is "justified on the ground that the right of cross-

examination initially afforded provides substantial compliance with the purposes behind the confrontation requirement." *Id.* at 722. See *California* v. *Green*, *supra*, 399 U.S. at 166. As this Court explained in *Mattox* v. *United States*, *supra*, 156 U.S. at 243:

> There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.

In sum, this Court's prior decisions establish that where a witness is shown to be unavailable despite the prosecution's good faith efforts to obtain his presence at trial,[3] the Confrontation Clause does not bar the introduction of his recorded testimony taken "at a full-fledged hearing," at which the defendant was represented by counsel who was given "a complete and adequate opportunity to cross-examine." See *Pointer* v. *Texas*, 380 U.S. 400, 407 (1965). So long as the defendant has had "an adequate opportunity to cross-examine" a witness at a prior hearing, and defense counsel has "availed himself of that opportunity," the transcript of that prior testimony is admissible because it bears "sufficient 'indicia of reliability' and afford[s] 'the trier of fact a satisfactory basis for evaluating the truth of the prior statement.' " *Mancusi* v. *Stubbs*, 408 U.S. 204, 216 (1972), quoting *Dutton* v. *Evans*, *supra*, 400 U.S. at 89.[4]

[3] As the Ohio Supreme Court recognized (Pet. App. 19), the State may introduce prior recorded testimony only when it has established necessity by showing that it had made a good faith effort to produce the witness at trial. *Barber* v. *Page*, *supra*, 390 U.S. at 724–725. The Ohio Supreme Court upheld the trial court's finding that Anita Isaacs could not be produced at trial because her whereabouts were unknown (Pet. App. 20).

The Ohio Supreme Court rested its determination that the Confrontation Clause had been violated on the fact that Anita Isaacs was never cross-examined, and on the further conclusion that the opportunity for examination at the preliminary hearing was not an effective substitute for the opportunity to cross-examine her at trial. The principal question posed in this case is whether respondent's direct examination of Isaacs at the preliminary hearing was the equivalent of cross-examination for purposes of the Confrontation Clause. If so, the case is on all fours with *California* v. *Green*, *supra*, 399 U.S. at 166, which held that the admission of

[4] In *Dutton* v. *Evans* the Court held that a co-conspirator's post-arrest statement was admissible, despite the fact that there had been no actual confrontation, because the statement possessed sufficient "indicia of reliability." Needless to say, *Dutton* did not call into question the line of decisions holding that prior recorded statements are admissible when the reliability of the statement has been guaranteed by exercise of an adequate opportunity for cross-examination, and the subsequent decision in *Mancusi* v. *Stubbs* reaffirmed the traditional analysis. Since this case falls comfortably within the established line of decisions regarding prior recorded statements, there is no need to test the limits of *Dutton* to determine what other factors might be sufficient to establish reliability where there has been no exercise of a meaningful opportunity for actual confrontation.

an unavailable witness's preliminary hearing testimony provided "substantial compliance with the purposes behind the confrontation requirement." At least where, as here, the defendant has had a meaningful opportunity to examine a witness at length at a preliminary hearing,[4a] *Green* holds that the differences between a preliminary hearing and trial are not sufficient to warrant distinguishing between the two for purposes of the Confrontation Clause.

II. DIRECT EXAMINATION MAY BE THE EQUIVALENT OF CROSS-EXAMINATION FOR CONFRONTATION PURPOSES

The function of cross-examination is to provide a basis on which the trier of fact can evaluate the truthfulness of a witness's statements.[5] Cross-examination serves this function by giving the party against whom a witness's testimony is offered an opportunity to develop "(a) the remaining and qualifying circumstances of the subject of the testimony, as known to the witness, and (b) facts which diminish the personal trustworthiness of the witness." 5 J. Wigmore, *Evidence* § 1368 at 36–37 (Chadbourn rev. ed. 1974). Cross-examination enhances the truth determining process by allowing an opposing

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[4a] We assume that one component of such a "meaningful opportunity" is the "similar motive" to which Fed. R. Evid. 804 (b)(1) refers. Even if a defendant has not taken advantage of a previous opportunity to cross-examine a witness who has become unavailable by the time of trial, the admission of the prior testimony of that witness would not violate the Confrontation Clause so long as the defendant's motive to cross-examine at the earlier proceeding was the same as or similar to what it would be at trial. See note 17, *infra*.

[5] "[P]robably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case." *Pointer* v. *Texas*, *supra*, 380 U.S. at 404.

party to explore " 'the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion' " of an adverse witness. *Bruton* v. *United States*, 391 U.S. 123, 136 n.12 (1968), quoting 5 J. Wigmore, *Evidence* §1362 at 3 (3d ed. 1940).[6]

Although there have traditionally been certain limitations on the scope of direct examination that have not been applicable to cross-examination, the modern procedural rules now in force in most jurisdictions afford a party substantial latitude in challenging adverse testimony on direct, as well as cross-examination. The most serious limit traditionally placed on the scope of direct examination was the voucher rule,[7] followed in many jurisdictions, which prohibited a party from impeaching his own witness, on the ground that the party " 'vouches for his credibility' " and is bound by anything his witness may say. *Chambers* v. *Mississippi*, 410 U.S. 284, 295, 297 (1973), quoting *Clark* v. *Lansford*, 191 So.2d 123, 125 (Miss. 1966).[8] The voucher rule has been abolished in the federal system, where "[t]he credibility of a witness may be attacked by any party,

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[6] In his Foreword to the *Model Code of Evidence*, Professor Edmund Morgan states that the role of cross-examination is to test "the perception, memory, narration and sincerity of a witness." *Model Code of Evidence* 37 (1942).

[7] "Although the historical origins of the 'voucher' rule are uncertain, it appears to be a remnant of primitive English trial practice in which 'oath-takers' or 'compurgators' were called to stand behind a particular party's position in any controversy." *Chambers* v. *Mississippi*, 410 U.S. 284, 296 (1973).

[8] In *Chambers* this Court concluded (410 U.S. at 297–298) that the application of a state voucher rule denied the defendant due process where it precluded him from questioning a witness about the fact that the witness had admitted committing the crime for which the defendant was being tried.

including the party calling him" (Fed. R. Evid. 607), and in many states as well.[9]

The other principal restriction traditionally placed on the scope of direct examination has been the general rule that leading questions are not permissible on direct, although they are ordinarily allowed during cross-examination. See 3 J. Wigmore, *Evidence* § 769 at 154, §773 at 165 (Chadbourn rev. ed. 1970); 3 *Weinstein's Evidence* ¶611[05], at 611-54 (1978). However, this general rule is subject to an exception that affords substantial flexibility when a witness gives adverse testimony on direct examination: leading questions are permitted when a witness is hostile, biased against the party calling him, or unwilling to testify. 3 J. Wigmore, *Evidence* §774 at 167 (Chadbourn rev. ed. 1970); *McCormick on Evidence* §6 at 10 (2d ed. E. Cleary 1972); Fed. R. Evid. 611(c).[10]

Ohio, like the federal courts, follows these liberalized rules and permits a party to impeach his own witness, and to request a ruling that a witness is hostile so that leading questions may be used on direct examination. See, *e.g.*, *State* v. *Minneker*, 27 Ohio St. 2d 155, 271

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[9] *E.g.*, Ark. Stat. Ann. §28-1001, Uniform Rules of Evidence 607 (Cum. Supp. 1977); Me. Rev. Stat. Ann., Me. R. Evid. 607 (Supp. 1978); Minn. R. Evid. 607; Mo. R. Evid. 607; Neb. Rev. Stat. §27-607 (1975); Nev. Rev. Stat. §50.075 (1973); N.M. Stat.Ann. §20-4-607 (Supp. 1975); N.D. R. Evid. 607; Wis. Stat. Ann. §906.06 (West 1975).

[10] See, *e.g.*, *United States* v. *Karnes*, 531 F.2d 214, 217 (4th Cir. 1976); *United States* v. *Lemon*, 497 F.2d 854, 859 (10th Cir. 1974); *United States* v. *DeBose*, 410 F.2d 1273, 1276 (6th Cir. 1969), cert. denied, 401 U.S. 920 (1971); *Lerma* v. *United States*, 387 F.2d 187, 190 (8th Cir.), cert. denied, 391 U.S. 907 (1968); *United States* v. *Ghaloub*, 385 F.2d 567, 571-572 (2d Cir. 1966); *Bieber* v. *United States*, 276 F.2d 709, 712-713 (9th Cir. 1960).

N.E.2d 821 (1971); *State* v. *Doherty*, 56 Ohio App. 2d 112, 381 N.E.2d 960 (1978).[11]

In the federal system and in states, such as Ohio, where the rules governing direct examination provide a party with ample flexibility to challenge adverse testimony by his own witnesses, the defendant's direct examination of a witness should be treated as the equivalent of cross-examination for purposes of the Confrontation Clause. Under modern state procedural rules—and under the Federal Rules of Evidence—direct examination allows the defendant to develop any qualifying circumstances and any factors that cast doubt on the witness's reliability and trustworthiness. The defendant can impeach his witness by all the traditional means, including any prior inconsistent statements, motives for concealment, or bias. If the witness becomes hostile or evasive, the defendant can request a ruling that permits the use of leading questions.

Since such wide-ranging direct examination permits an accused to "test[] the recollection" and "sift[] the conscience" of an adverse witness, *Mattox* v. *United States*, *supra*, 156 U.S. at 242, it serves the function of assuring the "accuracy of the truth-determining process." *Dutton* v. *Evans*, *supra*, 400 U.S. at 89. Accord-

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[11] Both Ohio cases cited involved the State's direct examination of a witness who had surprised the prosecutor by giving testimony that was inconsistent with the witness's pretrial statement, but they are examples of the general practice permitting the designation of a party's own witness as hostile. See *State* v. *Minneker*, *supra*, 27 Ohio St. 2d at 158, 271 N.E. 2d at 824. The cases state the additional restriction that the State may refresh its witness's memory with his prior statement, but may not introduce the prior statement as evidence of the defendant's guilt. *State* v. *Doherty*, 56 Ohio App. 2d at 113, 381 N.E. 2d at 961.

Under Ohio law, the trial judge has discretion in ruling on a request that a witness be declared hostile. *State* v. *Parrott*, 27 Ohio St. 2d 205, 210, 272 N.E. St. 2d 112, 116 (1971) (upholding trial court's refusal of defendant's request to designate witness as hostile where defendant gave no reason for his request).

ingly, direct and redirect examination should be treated as the equivalent of cross-examination for purposes of the Confrontation Clause. Of course the application of particular procedural or evidentiary rules may lead the trial judge to restrict either direct or cross-examination in a particular case, giving rise to a claim of infringement of the defendant's Sixth Amendment right to confront the witnesses against him, and such claims must be addressed on a case-by-case basis. But there is no reason to differentiate, as a general rule, between direct and cross-examination.

So far as we know, the Confrontation Clause question presented here is one of first impression, and no court has passed on these arguments. But those commentators that have addressed the question have accepted the foregoing analysis and have concluded that direct (and redirect) examination by an accused should be deemed the equivalent of cross-examination for confrontation purposes. 4 *Weinstein's Evidence*, ¶804(b)(1)[05] at 804–66 (1978); *McCormick on Evidence* §255 at 617 (2d ed. E. Cleary 1972); cf. Falknor, *Former Testimony and the Uniform Rules: A Comment*, 38 N.Y.U. L. Rev. 651, 651 n.1, 659–660 (1963).

The Federal Rules of Evidence (as well as the nearly identical Uniform Rules of Evidence) have likewise adopted this analysis and they draw no distinction between prior direct examination and prior cross-examination. Rule 804(b)(1) of the Federal Rules creates an exception to the hearsay rule for "[t]estimony given as a witness at another hearing of the same or a different proceeding * * * if the party against whom the testimony is now offered * * * had an opportunity and similar motive to develop the testimony *by direct, cross, or redirect examination*" (emphasis added).[12] Although the Advisory Committee Notes for

[12]Rule 804 (b) (1) of the Uniform Rule of Evidence is identical to Fed. R. Evid. 804 (b) (1).

Rule 804 recognize that this Court's prior decisions leave open the question whether direct examination is equivalent to cross-examination for purposes of the Confrontation Clause, the Committee Notes make a strong case for treating them as equivalents (28 U.S.C. App. at 591):

> Under the exception, the testimony may be offered (1) against the party *against* whom it was previously offered or (2) against the party *by* whom it was previously offered. In each instance the question resolves itself into whether fairness allows imposing, upon the party against whom now offered, the handling of the witness on the earlier occasion. * * * A more direct and acceptable approach is simply to recognize direct and redirect examination of one's own witness as the equivalent of cross-examining an opponent's witness. [Citations omitted.] Allowable techniques for dealing with hostile, doublecrossing, forgetful, and mentally deficient witnesses leave no substance to a claim that one could not adequately develop his own witness at the former hearing. An even less appealing argument is presented when failure to develop fully was the result of a deliberate choice.

III. RESPONDENT'S EXAMINATION OF ANITA ISAACS WAS THE EQUIVALENT OF FULL AND EFFECTIVE CROSS-EXAMINATION

A review of respondent's interrogation of Anita Isaacs at the preliminary hearing provides a vivid example of how direct examination conducted pursuant to modern procedural rules serves precisely the same function as cross-examination. Although Isaacs was called as a defense witness and all of her testimony was technically given on direct examination, it rapidly became clear that she was contradicting—not corroborating—respondent's claims. From that point on, respondent's interrogation of Isaacs served the pur-

pose of cross-examination, and it was conducted in precisely the same way as cross-examination of the same witness would have been conducted. Respondent's opportunity to confront Isaacs was in no way hampered by the fact that it occurred on direct examination, and it would exalt form over substance to treat this examination as insufficient to constitute confrontation merely because it was not termed cross-examination.

Although respondent called Isaacs as a defense witness, it became clear early in her testimony that she was contradicting his claims that she had given him her parents' credit cards, their silver chalice, and her father's checkbook. After a number of introductory questions, defense counsel asked Isaacs if she recognized the packet of credit cards respondent claimed that she had given him to use (A. 18). When Isaacs looked through the cards in the packet, she did not identify them as cards that she had given to respondent; to the contrary, her only comment was that she had never seen many of the credit cards before (A. 18–19). Defense counsel then asked Isaacs if she could identify the small silver chalice that respondent said she had asked him to have appraised (A. 19). Isaacs responded that she had never seen the chalice outside of her parents' home (*ibid.*).

From that point on although defense counsel never asked for a formal ruling that Isaacs was a hostile witness, the form and tenor of his questions became identical to questions asked during cross-examination or direct examination of a hostile witness. Counsel immediately began to use leading questions, asking—in the wake of Isaacs' statement, just moments before, that she had never seen the chalice outside her parents' home —"You have never seen it in your apartment?" (A. 20). At times, his questioning became not only leading, but almost belligerent. For example, counsel stated, "Now, since December 24th, isn't it a fact that you have been in your parents' home?" (*ibid.*). He challenged Isaacs' earlier statements about the credit

cards with the same type of leading questions (A. 21), asking "is it a fact that you have seen these credit cards since the 23rd of December, and isn't it a fact also that you gave these credit cards to [respondent]?" Despite Isaacs' denials, defense counsel continued to press her in an attempt to establish her motive for giving respondent the cards. Again using a series of leading questions, counsel asked: "You never talked to [respondent], here, about buying a color portable TV set that was his? * * * You never gave him credit cards in order to help pay for that TV set?" (A. 21). Despite her denials, counsel elicited the fact that petitioner had a TV set and that Isaacs had only a $20 "old model" TV for which she had rigged a makeshift antenna (A. 21–22).

Respondent's examination of Anita was thus the equivalent of cross-examination, and it provided him with an ample opportunity for confrontation. The transcript reveals that there were no restrictions on respondent's efforts to confront and question Isaacs. The State did not object to any of the questions, nor did the court ever rule any of them out of order. Neither respondent nor the Ohio Supreme Court has suggested any way in which he was hampered by the fact that he was technically conducting a direct examination. Respondent has never identified any subject that he would have inquired into if he had been given an opportunity formally to cross-examine Isaacs.

Moreover, it was respondent himself who elected to call Isaacs as a witness at his preliminary hearing and thus to create the evidence about which he now complains; and after it became clear that her testimony was adverse to him, he elected to continue his examination in an effort to undermine her adverse comments. The State did not elicit Isaacs' testimony, and it did not seek to frustrate respondent's attempt to shake Isaacs' story. Even apart from traditional notions that a party vouches for the credibility of the witnesses he calls, these circumstances further undermine respondent's

contention that he was unfairly prejudiced by the admission of Isaacs' testimony.

IV. *California* v. *Green* ESTABLISHES THAT THE CONFRONTATION CLAUSE WAS NOT VIOLATED IN THIS CASE

The Ohio Supreme Court attempted to answer the question it believed had been left open by this Court's decision in *California* v. *Green*, namely, whether merely affording the defendant the *opportunity* to cross-examine a witness at the preliminary hearing is sufficient—even if the defendant does not avail himself of that opportunity—to constitute substantial compliance with the confrontation requirement so as to permit the introduction of the witness's statements at trial.

As we have shown above, the premise of this portion of the state court's decision is erroneous: respondent's direct examination of Isaacs was the equivalent of full and unrestricted cross-examination.[13] Accordingly, the remaining question in the case is not, as the Ohio Supreme Court supposed, whether the mere opportunity to cross-examine the witnesses at a preliminary

[13] Accordingly, the Ohio Supreme Court erred in concluding that this case is governed by *Barber* v. *Page* (Pet. App. 22). *Barber* focused on the threshold requirement that the State show that it was unable to obtain the witness's presence at trial before any prior preliminary hearing testimony is offered—whether or not it was the subject of cross-examination. 390 U.S. at 724–725. It expressly left open the possibility that an opportunity for cross-examination at a preliminary hearing—even if not exercised—might satisfy the demands of the Confrontation Clause "where the witness is shown to be actually unavailable," finding it unnecessary to reach that question in the case before it. 390 U.S. at 725–726. And *Barber* certainly did not reject the proposition later upheld in *California* v. *Green*—that preliminary hearing testimony subject to actual confrontation may be introduced at trial when the witness is unavailable.

hearing—even if the defendant does not take advantage of it—suffices to afford substantial compliance with the Confrontation Clause if the government seeks to introduce an unavailable witness's preliminary hearing testimony. The narrower question presented on these facts is whether there has been substantial compliance with the Confrontation Clause when the defendant *has* availed himself of the opportunity to examine a witness at some length at his preliminary hearing, and has been permitted to do so without any significant limitation on either the nature or the scope of his examination. 399 U.S. at 166. Essentially the same question was posed in *California* v. *Green*, where this Court concluded that an extensive and unrestricted cross-examination conducted at a preliminary hearing was not sufficiently different from a cross-examination conducted at "an actual trial to warrant distinguishing the two cases for purposes of the Confrontation Clause." 399 U.S. at 165. Accordingly, the Court ruled that the defendant's cross-examination at the preliminary hearing afforded substantial compliance with the Confrontation Clause.

The factors cited by the Court to justify this conclusion in *Green* are equally persuasive in the instant case. Just as in *Green*, *supra*, 399 U.S. at 165:

> [Isaacs'] statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial. [Isaacs] was under oath; respondent was represented by counsel * * *; respondent had every opportunity to [examine Isaacs] as to [her] statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings.[14]

[14] As the State points out (Br. 40–41), Ohio's Rules of Criminal Procedure provide that a preliminary hearing is to be conducted under the rules of evidence applicable to criminal trials,

Since here, as in *Green*, respondent's counsel was not "significantly limited in any way in the scope or nature" of his examination at the preliminary hearing—and indeed respondent has never suggested any line of questioning that has not been pursued—the admission of Isaacs' testimony at trial did not violate the Confrontation Clause; the examination actually conducted at the preliminary hearing in both *Green* and this case provided "substantial compliance with the purposes behind the [C]onfrontation [Clause]." 399 U.S. at 166.

Neither respondent nor the Ohio Supreme Court has suggested any reason why this Court's analysis in *California* v. *Green* requires re-examination,[15] and we know of none.[16] The Ohio Supreme Court's opinion,

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the "full right of cross-examination." Ohio R. Crim. P. 5(B) (2), (3).

The only factor that has been suggested as distinguishing this case from *Green* is that in this case respondent was not represented at the preliminary hearing by "the same counsel in fact who later represented him at trial." 399 U.S. at 165. So far as we know, there has never been any suggestion that respondent's first attorney did not represent him adequately. He did not represent respondent at trial because he had in the interim been appointed to a state judgeship.

[15]The Ohio Supreme Court read *Green* narrowly and concluded (Pet. App. 23–24 & n.2) that the portion of the opinion in question was mere dictum. We disagree. The California Supreme Court had held that neither the opportunity for cross-examination at the preliminary hearing *nor* the right to cross-examine the witness at trial regarding his out-of-court statement satisfied the requirements of the Confrontation Clause. See 399 U.S. at 153. This Court made clear that "the California court was wrong on both counts," 399 U.S. at 153, and addressed both issues as alternative holdings. 399 U.S. at 164, 165. But more importantly, even if the relevant portion of the Court's opinion were viewed as dictum, respondent has shown no reason why that analysis is not correct and should not be followed here.

[16]It is worthy of note that, despite the Ohio court's suggestion that the discussion in *Green* is dictum, the *Green* analysis

quoting the dissenting opinion in *Green*, emphasizes the difference between the ultimate issue at trial—guilt beyond a reasonable doubt—and the narrower probable cause issue at the preliminary hearing stage (Pet. App. 21–22). The Ohio Supreme Court reasoned that defense counsel has little incentive to cross-examine witnesses at the preliminary hearing stage, since the issue then is only probable cause. But whatever the factors that may frequently cause defense counsel to forego examination of the adverse witnesses at a preliminary hearing, when the defendant *does* avail himself of the opportunity to confront these witnesses, and he is given a meaningful

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has been followed without exception by the lower federal courts and the state courts in cases involving both preliminary hearings and testimony given in other pretrial hearings. See, *e.g.*, *Phillips* v. *Wyrick*, 558 F.2d 489, 493–495 (8th Cir. 1977), cert. denied, 434 U.S. 1088 (1978) (preliminary hearing); *United States* v. *Lynch*, 499 F.2d 1011, 1023 (D.C. Cir. 1974) (same, but witness found not unavailable); *Havey* v. *Kropp*, 458 F.2d 1054, 1056–1057 (6th Cir. 1972) (same); *United States* v. *Bell*, 500 F.2d 1287 (2d Cir. 1974) (suppression hearing); *United States* v. *Harless*, 464 F.2d 953 (9th Cir. 1972) (same); *United States* v. *King*, 552 F.2d 833 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977) (deposition); *United States* v. *Ricketson*, 498 F.2d 367, 374 (7th Cir.), cert. denied, 419 U.S. 965 (1974) (same); *United States* v. *Singleton*, 460 F.2d 1148, 1152–1153 (2d Cir. 1972), cert. denied, 410 U.S. 984 (1973) (same); *United States ex rel. Duff* v. *Zelker*, 452 F.2d 1009, 1010–1011 (2d Cir.), cert. denied, 406 U.S. 932 (1971) (hearing on voluntariness of confessions).

State cases dealing with preliminary hearing testimony generally reached the same conclusion prior to this Court's decision in *Green*. See, *e.g.*, *Commonwealth* v. *Mustone*, 353 Mass. 490, 233 N.E. 1 (1968); *State* v. *Roebuck*, 75 Wash. 2d 67, 70, 448 P.2d 934, 937 (1968); *State* v. *Crawley*, 242 Ore. 601, 603–607, 410 P.2d 1012, 1014–1015 (1966).

The case cited by the Ohio court (Pet. App. 21) as support for its argument that a preliminary hearing does not provide a sufficient opportunity for cross-examination, *Government of the Virgin Islands* v. *Aquino*, 378 F.2d 540, 549 (3d Cir. 1967), in fact followed the accepted rule permitting the introduction at trial of preliminary hearing testimony.

opportunity to do so, the theoretical differences in motivation have not precluded a finding of substantial compliance with the confrontation requirement.[17]

In our view, the only question where, as here, the defendant has previously examined the witness whose preliminary hearing testimony is proffered, should be whether the earlier opportunity to confront the witness was a meaningful one in light of the circumstances. See

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[17] In a case where the defendant can show that he elected not to cross-examine a prosecution witness, or that he restricted his examination because of the nature of the preliminary hearing or the circumstances of the particular case, he may have a valid objection to the admission of the witness's preliminary hearing testimony. Fed. R. Evid. 804 (b)(1) provides that prior recorded testimony is admissible only where the defendant "had an opportunity *and similar motive to develop the testimony* by direct, cross, or redirect examination" (emphasis added). As the Advisory Committee Notes explain (28 U.S.C. App., page 591), Rule 804 was derived from the common law rule that former testimony is admissible only where the parties and the issues were the same in the prior proceeding, so that the former handling of the witness would be the equivalent of the examination that would have occurred if the witness had been present at trial. The Committee concluded (*ibid.*) that because "identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness, expressing the matter in the latter terms is preferable."

The Ohio Supreme Court apparently concluded that because the issue at a preliminary hearing is narrower than that at trial, the defendant's "motive" for cross-examination will never be the same in the two proceedings. Although there are no cases on point, we do not believe that Rule 804(b)(1) should be given such a categorical construction. Whatever may be the theoretical differences in motive in the general run of cases, where, as here, the defendant conducts an extensive examination at the preliminary hearing and has no plausible claim that there are other avenues that he would have explored with the witness at trial, it is a fair inference that his motive at the preliminary hearing was the same as it would have been at trial and that the testimony carries with it sufficient assurance of reliability to justify its admission under the Rule as well as under the Constitution.

Mancusi v. *Stubbs*, *supra*, 408 U.S. at 213. If, for example, the trial court arbitrarily restricted the scope of examination at the preliminary hearing, the defendant would have a valid basis for a claim that the confrontation afforded him was not adequate.[18] But *Green* correctly rejected the assumption that simply because the ultimate issue at a preliminary hearing is not absolutely identical to that at trial, the earlier cross-examination was necessarily so restricted as to be inadequate to satisfy the confrontation requirement. The proper inquiry is whether the former examination of the witness was the substantial equivalent of the examination that would have taken place at trial. Since respondent's examination of Isaacs, involving an obvious effort to discredit her adverse testimony, amply meets these criteria, the introduction of her preliminary hearing testimony did not violate the Confrontation Clause.

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[18] The defendant might even seek to show that preliminary hearings in his jurisdiction are so hurried and perfunctory that a a defendant may really have little or no opportunity to cross-examine the witnesses against him. See Graham and Letwin, *The Preliminary Hearing in Los Angeles: Some Field Findings and Legal Policy Observations*, 18 U.C.L.A. L. Rev. 635, 657 and n.73 (1971). But it has not been suggested in this case that defense counsel was prevented either by prevailing practice or by actions of the court from conducting as thorough an examination as he desired.

CONCLUSION

The judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted.

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JULY 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-756

STATE OF OHIO, *Petitioner*

v.

HERSCHEL ROBERTS, Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

AND

BRIEF FOR OHIO PUBLIC DEFENDERS ASSOCIATION AS *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Ohio Public Defenders Association hereby respectfully moves the Court for leave to file a brief *amicus curiae* in this case in support of the respondent, as provided in Rule 42 of the Rules of this Court. The consent of the attorney for the respondent has been obtained. The consent of the attorney for the petitioner was requested but refused.

The Ohio Public Defenders Association, a non-profit organization incorporated under the laws of Ohio in 1973, has as its basic purpose the improvement of indigent criminal defense in Ohio. Our membership of two hundred and twenty-four represents all facets of criminal defense work, and includes county public defenders, private counsel, law school faculty and law students. The members of the Association represent clients involved in an estimated fifty-five percent of all misdemeanor and sixty-five percent of all felony cases arising annually in Ohio. With a membership comprising such a substantial percentage of the Ohio criminal bar, the Association is concerned with the case at bar and all other cases relating to criminal procedure which affect the rights of criminal defendants.

The Association's *Amicus* Committee has filed briefs in both the Ohio Supreme Court and the United States District Court, Northern District of Ohio, in other actions which involved the rights of criminal defendants. The instant case is of interest to the Association and its members since it originally arose in Ohio and directly concerns

an Ohio statute, Section 2945.49 of the Ohio Revised Code, which authorizes the use at trial of the prior recorded testimony of an unavailable witness. The Association has already expressed an interest in the interpretation and application of this particular statute as is evidenced by our entry as an *amicus curiae* in the case of *State of Ohio v. Ricardo Smith*, 58 Ohio St. 2d 344, ____ N.E. 2d ____ (1979). In that case, the Ohio Supreme Court limited the use of recorded preliminary hearing testimony of a witness unavailable at trial to cases where the defendant's cross-examination of the witness at the preliminary hearing was more than brief and ineffective.

Counsel for the respondent has dealt and will deal with the question of whether the mere opportunity for cross-examination of a witness at a preliminary hearing is sufficient to satisfy the Confrontation Clause of the Sixth Amendment to the United States Constitution, when the recorded preliminary hearing testimony is sought to be read into evidence, in the absence of the witness, at a criminal trial. Although the Association is concerned with the outcome of this question, we feel that this case presents an opportunity for the Court to address a more compelling concern regarding the use of recorded preliminary hearing testimony of an absent witness, the resolution of which may have a great impact upon the practice of criminal defense in Ohio and throughout the nation. That concern is the constitutionality, under the Confrontation Clause of the Sixth Amendment, of the use at trial of the recorded testimony of a witness, taken at either a preliminary examination or a preliminary hearing, regardless of the scope of cross-examination at the earlier hearing, when the

witness is, for any reason, unable to appear and testify at the subsequent trial.

Section 2945.49 of the Ohio Revised Code authorizes the use of testimony "taken at an examination or a preliminary hearing at which the defendant is present," along with testimony taken at a former trial of the same case or at a deposition arranged by either party, at a later trial of the defendant, whenever the witness has died, become incapacitated, or is otherwise unavailable. This statutory provision was relied upon in this case to secure the admittance of the recorded preliminary hearing testimony at issue. In *Barber v. Page*, 390 U.S. 719, 725 (1968), this Court stated that: "[t]he right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness." The Association feels that based upon the significant differences between preliminary hearings and trials and depositions, which directly affect the scope and effectiveness of cross-examination, the inclusion of preliminary examination and preliminary hearing testimony within the purview of Section 2945.49 is violative of the Confrontation Clause of the Sixth Amendment. See *California v. Green*, 399 U.S. 149 (1970) (Brennan, J., dissenting). A decision of this Court which has as its basis the conclusion that there is a constitutional distinction between the *opportunity* for cross-examination and *actual* cross-examination, in determining the admissibility at trial of recorded preliminary hearing testimony of an absent witness, will not go far enough to resolve all of the constitutional infirmities of Section 2945.49. We believe that our contribution should assist the Court in

viewing the question here presented in a broader context, thus ensuring a clearer understanding of the profound impacts its decision may have upon criminal defense in Ohio and throughout the country.

For the foregoing reasons, the Ohio Public Defenders Association respectfully requests that this motion be granted.

Respectfully submitted,

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BRIEF OF
OHIO PUBLIC DEFENDERS ASSOCIATION
AS *AMICUS CURIAE*

INDEX

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

Section 2945.49 of the Ohio Revised Code (Page, 1974):

> Testimony taken at an examination or a preliminary hearing at which the defendant is present, or at a former trial of the cause, or taken by deposition at the instance of the defendant or the state, may be used whenever the witness giving such testimony dies, or cannot for any reason be produced at the trial, or whenever the witness has, since giving such testimony, become incapacitated to testify. If such former testimony is contained within a bill of exceptions, or authenticated transcript of such testimony, it shall be proven by the bill of exceptions, or transcript, otherwise by other testimony.

CITATIONS OF AUTHORITY

QUESTION PRESENTED

Whether Section 2945.49 of the Ohio Revised Code, specifically the language which permits the recorded preliminary examination or preliminary hearing testimony of an unavailable witness to be admitted into evidence at the trial of a criminal defendant, is unconstitutional as violative of the Confrontation Clause of the Sixth Amendment to the United States Constitution.

INTEREST OF *AMICUS CURIAE*

The Interest of Ohio Public Defenders Association as *amicus curiae* is set forth in the Association's motion for leave to file this brief *amicus*, to which motion this brief is annexed.

SUMMARY OF ARGUMENT

I

A. The Bill of Rights of the United States Constitution sets forth guarantees made to every citizen for protection from the sovereign government. The most difficult of these guarantees to protect have been those which are asserted by citizens charged with or convicted of crimes. The right of confrontation in all criminal prosecutions, guaranteed by the Sixth Amendment, is one of these rights.

B. This Court has recognized several exceptions to the Sixth Amendment's confrontation guaranty. Notably, the admissibility of dying declarations has been upheld by this Court, and the use of recorded trial testimony of a now-deceased witness at an accused's second trial has also been approved. These exceptions have been grounded in public policy or in the necessities of the cause at issue.

C. The constitutionality of the admission at an accused's trial of an absent witness' recorded preliminary hearing testimony has not been decided by this Court. The prior case law supports the proposition that the Confrontation Clause may be satisfied when the witness is shown by the State to be unavailable to testify at trial and the witness was cross-examined by defense counsel at the preliminary hearing. This Court has not, however, relied upon this proposition in a case like the one at bar: where the witness, whose preliminary hearing testimony was admitted at the respondent's trial, was *actually* absent at trial.

D. Section 2945.49 of the Ohio Revised Code should be interpreted to exclude any use of preliminary hearing testimony as a substitute for live witness testimony at a criminal trial. A decision by this Court, which upholds the validity of this language of Section 2945.49, will likely require defendants to choose between their right to confrontation and their right to a preliminary hearing. If defendants waive their preliminary hearing rights in Ohio, they will lose their right to have a probable cause determination of their guilt or innocence. If defendants do not waive their rights to a preliminary hearing, then these hearings will become mini-trials, as cross-examination becomes more searching and extensive. Such an exception to the Confrontation Clause would allow the State to obtain convictions at the expense of the accused's basic trial rights while adding additional burdens to our court system. The balance here should be struck in favor of the accused.

II

A. The Sixth Amendment to the United States Constitution guarantees that a criminal accused shall have the right to confront the witnesses against him. The object of the Confrontation Clause has been viewed by this Court as the prevention of the use of *ex parte* affidavits and depositions at the trial of an accused, in lieu of an actual examination of the witness by the accused, thus ensuring that the defendant will have

examined the witness face-to-face and that the trier of fact will have the opportunity to view the witness' demeanor. This Court has, however, created some exceptions to the literal reading of the Confrontation Clause. The purported exception at issue in this case is the admissibility at trial of an absent witness' recorded preliminary hearing testimony. Generally, this Court has appeared to uphold the use at trial of such recorded testimony, as long as it was established that the witness was truly unavailable to testify at trial and that the defendant had the *opportunity* to cross-examine the witness at the preliminary hearing. This Court, however, has not declared, in its prior holdings, that the *opportunity* for the accused to cross-examine the witness meant anything less than *actual* cross-examination. The mere opportunity for cross-examination therefore does not satisfy the requirements of the Confrontation Clause.

B. In the present case, the witness, Anita Isaacs, was not cross-examined by the respondent's counsel at the preliminary hearing, as was recognized by the Supreme Court of Ohio. Ms. Isaacs was called on direct examination by the respondent's counsel and was at no time declared by the court to be a hostile witness. Although "leading" questions were asked of the witness by the respondent's counsel, no objections were made by the petitioner, and the petitioner did not cross-examine Ms. Isaacs. The form and substance of the counsel for the respondent's examination of Ms. Isaacs was that of direct examination.

The absent witness' recorded preliminary hearing testimony was admitted into evidence at the respondent's trial pursuant to Section 2945.49 of the Ohio Revised Code. The Supreme Court of Ohio held that, notwithstanding Section 2945.49, the Confrontation Clause was violated when the recorded preliminary hearing testimony was admitted, because it was shown that the witness had not been cross-examined by the respondent's counsel at the preliminary hearing. This Court should not disturb the ruling of the Supreme Court of Ohio, which correctly interpreted the facts and properly applied the prevailing case law.

ARGUMENT

Proposition of Law One:

OHIO REVISED CODE §2945.49, TO THE EXTENT THAT IT PURPORTS TO PERMIT THE USE OF PRELIMINARY HEARING TESTIMONY OF AN ABSENT WITNESS AT A CRIMINAL TRIAL, VIOLATES THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND SHOULD BE DECLARED INVALID. TO THE EXTENT THAT IT PURPORTS TO PERMIT THE USE AT TRIAL OF ANY PRIOR TESTIMONY OTHER THAN WHERE THE WITNESS IS DEAD, INSANE, OR DISABLED, OR WHERE THE DEFENDANT HAS PROCURED THE WITNESS ABSENCE, OHIO REVISED CODE §2945.49 IS ALSO INVALID.

A. The Right to Confrontation

The Bill of Rights was appended to the United States Constitution in 1791, to set forth explicitly the guarantees made to every citizen for protection from the sovereign, in this case, the United States Government. Characteristic of the suspicion of government which permeates the basic document, as embodied in the elaborate system of checks and balances contained therein, are the prohibitions and entitlements set forth in the first eight amendments. The proponents of the amendments knew that the United States Government, although a government of laws, would be administered by imperfect men and women. Therefore, it was insufficient to leave to common understanding the various freedoms and rights which had been wrested at great cost from despots, ancient and modern. They determined to commit their common understanding to writing, so that those who followed could be constantly reminded of the necessity for citizens to remain ever watchful lest their hard-won rights and freedoms be eroded.

The most difficult of these rights for citizens to protect and defend have been the rights which, because of their very nature,

are most frequently asserted by those charged with or convicted of crimes, and rarely needed by a majority of the citizenry. Those who have done no wrong need not fear searches of their persons, houses, papers, and effects, since the fruits of such searches would not incriminate them. Innocent citizens need never exercise their rights to silence since, having done no wrong, they have nothing to hide from the authorities. Perhaps most difficult of all for the citizen who expects never to have to undergo a criminal trial, is the protection and defense of the trial rights guaranteed by the Sixth Amendment.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.[1]

The language of the Sixth Amendment is plain and straight forward, and at this late date, almost all of its provisions are given full effect throughout the United States. In many jurisdictions, speedy trials are statutorily ensured by providing for dismissal of charges if the defendant is not brought to trial within a specified period of time. While the size of juries required by the Sixth Amendment has not been finally determined, the right to a jury trial in serious criminal cases has been firmly established. Compulsory process, within reason, is available to all criminal defendants. And the right to counsel, as this Court well knows, has been extended to practically every stage of criminal proceedings.

The right to confrontation, however, has not fared so well, for a variety of reasons. The right of confrontation is analogous to the evidentiary rule prohibiting hearsay. Designed to ensure,

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[1] United States Constitution, Amend. VI.

under an adversary system, the reliability of testimonial evidence by subjecting such evidence to cross-examination before the trier of fact, the hearsay rule has become, through the years, riddled with exceptions. Of course, the exceptions are usually grounded in public policy, and the reliability of the out-of-court statements is said to be guaranteed by various factors. So it has been with the Sixth Amendment's confrontation clause.

B. The Exceptions

The necessity for the use of dying declarations in criminal trials was examined by this Court in the case of *Clyde Mattox v. United States*.[2] Even though the particular question was whether the *defendant* was entitled to elicit testimony with respect to dying declarations on his behalf, and, consequently, no Sixth Amendment objection was raised in the case, the Court's discussion makes clear its willingness to except such statements from the hearsay prohibition, and by inference, from the Sixth Amendment's confrontation guarantee. This is so in spite of recognition by the Court that such statements, by their very nature, are made out of court, are not under oath, and are not subject to cross-examination.

After the reversal of conviction in *Clyde Mattox*, the defendant suffered a second conviction. At his second trial, the transcribed testimony of two of the government's witnesses at the first trial was allowed into evidence against him, since both witnesses had died between the two trials. The case was again pursued to this Court which, in *Mattox v. United States*,[3] had occasion to directly examine the question of whether such a procedure is violative of the Sixth Amendment confrontation right.

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[2] 146 U.S. 140, 13 S. Ct. 50, 36 L. Ed. 917 (1892).

[3] 156 U.S. 237, 15 S. Ct. 337, 39 L. Ed. 409 (1895).

The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of the personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however, beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.[4]

As in the *Clyde Mattox* case, the death of a witness gives rise to a special set of circumstances whereby introduction of out-of-court statements, while clearly violative of the confrontation right, is nevertheless upheld on policy grounds based on other indicia of reliability and balancing of the interests of the accused with those of society.

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[4] 156 U.S. at 242-243.

C. The Use of Preliminary Hearing Testimony

To the extent that preliminary hearing testimony is now permitted to be introduced at trial in the absence of the witness, this "exception" to the confrontation clause has grown over the years, not as a result of affirmative decision and rational choice by this or any other court, but almost as a matter of unstated assumption. One of the earliest cases in which this Court addressed itself to the question is that of *Motes v. United States*.[5] Mr. Justice Harlan, for a unanimous Court, cites at length from *Regina v. Scaife*[6] for the apparent proposition that only three circumstances would justify the use at trial of the deposition, taken before magistrates, of the absent witness: 1) the witness has died, 2) the absence of the witness was procured by the accused, and 3) the witness is so ill as to be unable to travel. In *Motes*, since there was absolutely no showing that the absence of the witness had been procured by the accused, and since the witness had been seen in the court house within an hour of the commencement of trial, use of the transcript of his testimony given at the preliminary trial of the case was held to be barred by the Confrontation Clause. The fact that the defendants had the opportunity to, and did, in fact, cross-examine the witness at the preliminary trial, played no part in the Court's decision.

The limited exceptions to the Confrontation Clause, referred to in this Court's opinion in the *Motes*[7] case, were pointedly not at issue when the Court decided the case of *West v. Louisiana*[8]. In the words of Mr. Justic Peckham,

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[5] 178 U.S. 458, 20 S. Ct. 993, 44 L. Ed. 1150 (1900).

[6] 2 Den. Cr. C. 281, 285-286, S.C. 17 Q.B. 238, 5 Cox Cr. C. 243 (1851).

[7] *Supra*, Note 5.

[8] 194 U.S. 258, 24 S. Ct. 650, 48 L. Ed. 965 (1904).

> As the Sixth Amendment does not apply to the state courts, the question as to what is required under its provisions in order to preserve the right to be confronted with the witness is eliminated from any inquiry by this court in this case.[9]

Because the question of the admissibility of the absent witness' preliminary hearing testimony had been decided by the Louisiana Supreme Court, interpreting its own constitution and statutes, this Court concluded that the state of the law in Louisiana on this issue did not present a federal question. Its inquiry was limited to determining whether the practice complained of violated the defendants' due process rights under the Fourteenth Amendment. Since the Sixth Amendment had not been made applicable to the states, the Court concluded that no federal right of the defendants had been violated and that they had been accorded due process of law.

Even though he specifically excluded consideration of the proper application of the Sixth Amendment Confrontation Clause from the decision in the case, Mr. Justice Peckham was at some pains to open the door to consideration of the broadening of exceptions to the confrontation right, should the proper case arise in a federal prosecution in the future. *West* involved a non-resident witness who was permanently absent from the state, and whom the prosecution was unable to produce. After listing the undisputed grounds for allowing introduction of prior recorded testimony at trial in the absence of the witness (death, insanity, disabling illness, connivance of defendant), Mr. Justice Peckham suggested, in response to the defendants' claim that the circumstances in the case would not have constituted an exception to the confrontation right at common law, that there is a split in authority on this question.[10] After citing several previous decisions of this Court, none of which went so far as to permit the former testimony of witnesses who were

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[9] *Id.* at 264.

[10] *Id.* at 262.

merely unavailable at trial, he somewhat gratuitously concludes that "in not one of these cases was it held that, under facts such as were proved in this case, there would have been a violation of the Constitution in admitting the deposition in evidence."[11]

To the extent that it held that the Sixth Amendment did not apply in state court prosecutions, *West* was overruled by this Court's decision in the case of *Pointer v. Texas*.[12] But apart from the declaration that confrontation and the right to cross-examination are fundamental rights applicable to the states through the Fourteenth Amendment,[13] *Pointer* is, in essence, a right to counsel case, following hard on the heels of *Gideon v. Wainwright*[14] and *Malloy v. Hogan*[15]. Mr. Justice Black framed the question for the Court's decision as follows:

> . . . petitioner's objection is based not so much on the fact that he had no lawyer when Phillips made his statement at the preliminary hearing, as on the fact that use of the transcript of that statement at the trial denied petitioner any opportunity to have the benefit of *counsel's cross-examination* of the principle witness against him.[16] (emphasis added)

His conclusion answers the question in the same right-to-counsel terms:

> Because the transcript of Phillips' statement offered against petitioner at his trial had not been taken at a time and under circumstances affording petitioner *through counsel* an adequate opportunity to cross-examine Phillips. . . . use of the transcript to convict petitioner denied him a constitutional right. . . .[17] (emphasis added)

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[11] *Id.* at 265-266.

[12] 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

[13] *Id.* at 403.

[14] 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

[15] 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 633 (1964).

[16] 380 U.S. at 403.

[17] *Id.* at 407-408.

In *Pointer*, Phillips, the absent witness, had moved from Texas to California some time before the trial, and did not intend to return. Without ever deciding the issue, in this or any previous case, the Court seems to assume that this "unavailability" of the witness would justify the use at trial of the witness' preliminary hearing testimony, if cross-examination through counsel had been available at that hearing. Indeed, Mr. Justice Black goes so far as to state at one point, that:

> The case before us would be quite a different one had Phillips' statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine,[18]

thus nudging a little wider the door opened by Mr. Justice Peckham in the *West*[19] case.

The practice of assuming, without deciding, the existence of a "mere unavailability" exception to the Confrontation Clause was continued, although in a somewhat muted fashion, in this Court's decision in *Barber v. Page*.[20] The principal evidence against the defendant at his trial was the preliminary hearing transcript of a co-defendant's testimony. The co-defendant was incarcerated in another state at the time of trial, and the prosecution made no affirmative effort to secure his presence to testify. The holding of the case is that: "a witness is not 'unavailable' for purposes of the ['mere unavailability'] exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial."[21] But Mr. Justice Marshall's treatment of the "mere unavailability" exception is very interesting. After first hearkening back to *Mattox*[22] for the proposition that confrontation

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[18] *Id.* at 407.

[19] *Supra*, Note 8.

[20] 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968).

[21] 390 U.S. at 724-725.

[22] *Supra*, Note 3.

guarantees both the opportunity of "testing the recollection and sifting the conscience of the witness,"[23] and *Pointer*[24] for the proposition that "the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal,"[25] he presents a short discussion concerning exceptions to the confrontation right. The only example cited of such as exception is *Mattox* (the witness died between first and second trials; testimony was given at trial rather than preliminary hearing). The term "substantial compliance" makes its first appearance in this Court's decision, being drawn from treatises on the law of evidence[26]. The Court acknowledges that the same treatises "have heretofore assumed that the mere absence of a witness from the jurisdiction was sufficient ground for dispensing with confrontation. . ."[27] But the Uniform Act To Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, along with the availability of writ of habeas corpus *ad testificandum*, have "largely deprived [the 'mere unavailability' exception] of any continuing validity in the criminal law."[28] But after seeming thus to have begun closing the door first opened in *West*,[29] Mr. Justice Marshall, in the penultimate paragraph of the opinion, again invites further use and application of this exception which has been largely deprived of validity:

[23] 390 U.S. at 721, quoting *Mattox v. United States, supra*, 156 U.S. at 242-243.

[24] *Supra*, Note 12.

[25] 390 U.S. at 721, quoting *Pointer v. Texas, supra*, 380 U.S. at 405.

[26] *See* 390 U.S. at 722.

[27] *Id.* at 723.

[28] *Id.*

[29] *Supra*, Note 8.

> While there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable, this is not, as we have pointed out, such a case.[30]

Once again, the Court suggested, but did not decide, that use of preliminary hearing transcripts at trial, in place of an absent witness, satisfies the confrontation requirement of the Sixth Amendment.

The Court's opinion in the case of *California v. Green*[31] amply displays the danger involved in a century-long unstated process of expansion of the confrontation exception. Since the case involved introduction of prior testimony and statements of a witness who was, in fact, present at trial, there was no necessity to address the question which the Court must decide in this case: whether preliminary hearing testimony may be introduced at trial where the witness is absent. Nevertheless, Mr. Justice White took the opportunity to examine the state of the law on this issue by way of comparison with the situation which was, in fact, presented by the case. Mr. Justice White reasoned that since the Court would probably find the preliminary hearing testimony admissible if the witness was absent, it surely could do no less when the witness was present. The Court cites *Mattox*[32] for the proposition that it "long ago held that admitting prior testimony of an unavailable witness does not violate the Confrontation Clause."[33] Of course *Mattox* involved a dead witness, whose prior testimony was given at a previous trial of the same case as opposed to the preliminary

[30] 390 U.S. at 725-726.

[31] 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970).

[32] *Supra*, Note 3.

[33] 399 U.S. at 165.

hearing testimony of a witness who is merely unavailable. The Court saw no significant difference between the preliminary hearing and the trial in *Green*. This conclusion is buttressed by the door-opening *dictum* from *Pointer*,[34] cited above, to the effect that different facts would make a different case. Overlooked is the fact that, in addition to being *dictum*, the quoted portion of *Pointer* has at least as much to do with the right to counsel as with the right to confrontation. Finally, ignoring the criticism of the "mere unavailability" exception found in *Barber v. Page*,[35] Mr. Justice Stewart goes directly to the door-opening paragraph quoted above to support the contention that use at trial of preliminary hearing testimony of an absent witness satisfies the demands of the confrontation clause.

D. The Use of Preliminary Hearing Testimony Under Section 2945.49 of the Ohio Revised Code.

At common law, and in the early confrontation cases decided by this Court, there appear to have been several common exceptions to the confrontation requirement. When a witness was dead, insane, or too sick to attend the trial, prior testimony or a dying declaration could be introduced against the defendant at trial. Also, if the accused was responsible for the failure of the witness to appear, he could hardly be heard to complain about the violation of his right to confrontation. It was never argued on behalf of these exceptions that they satisfied the confrontation requirement; rather, they were rooted in public policy and a balancing of the trial rights of defendants with the interests of the public in the administration of justice. It is only as the Court, by implication, has considered further exceptions to the confrontation requirement that it has become necessary to speak in terms of "substantial compliance" and "indicia of reliability".

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[34] *Supra*, Note 12.

[35] *Supra*, Note 20.

The proposed exception now before this Court with respect to the use of preliminary hearing testimony fits into this category of exceptions. It cannot be argued for on the basis of public policy, for what public policy is advanced by eroding the very basis of the adversary system, the right of accused persons to confront the witnesses against them? Several of the cases have spoken of confrontation as a trial right,[36] implying or stating that, in addition to providing the opportunity for cross-examining the witness, the Confrontation Clause also contemplates observation of the demeanor of the witness by the trier of fact, for the purposes of assessing the credibility of the witness. The opportunity for this assessment is lost in any case where the witness' testimony is presented by reading a transcript in the absence of the witness.

In Ohio, a defendant has a right to a preliminary hearing, to establish probable cause to hold him to answer a felony charge.[37] He may choose to waive this right for various tactical reasons. A decision by this Court that preliminary hearing testimony may be used against an accused at trial, in the absence of the witness, will likely force each defendant to balance his right to a preliminary hearing against the right of confrontation at trial. By waiving his right to a preliminary hearing, the accused will ensure that there will be no recorded hearing testimony to be used against him at trial, in the event a witness does not appear. However, the accused will then lose his right to have the State establish that there is sufficient evidence to warrant his case being bound-over to the common pleas court. He will give up an opportunity, before trial, to learn the identity of the witnesses against him and the nature of their testimony. Preliminary hearings are also discovery devices for both the defense and the prosecution.

By not waiving his right to a preliminary hearing, the defendant will necessarily be put to the task of cross-examining,

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[36] *E.g. Barber v. Page, supra.*

[37] *See* Rule 5(B)(1) of the Ohio Rules of Criminal Procedure.

to the fullest extent possible, each witness that testifies against him, to guard against the possible absence of a witness at trial. The apprehension that a witness' recorded testimony at the hearing may be admitted into evidence at trial will undoubtedly cause the defendant to approach the hearing as a mini-trial and cross-examine each witness extensively. In Ohio, a preliminary hearing must be held within five days of an arrest or service of summons, if the defendant is in custody, and within fifteen days of the same, if the defendant is not in custody.[38] Because there is generally little time for counsel to prepare for a preliminary hearing, the need for the proper preparation of extensive, searching cross-examination will prompt defense counsel to seek continuances of the preliminary hearing. More requests for continuances and longer preliminary hearings will result in placing heavier burdens upon the dockets of our already overworked municipal courts.

As concerned as society is with the apprehension and conviction of wrongdoers, the Court should resist the temptation to make the task of the state in securing convictions easier either at the expense of basic trial rights or at the expense of our over-burdened court system. The statute must be interpreted to exclude any use of preliminary hearing testimony as a substitute for live witness testimony at a criminal trial. To hold otherwise would be to undermine hundreds of years of common law tradition, and the intentions of the authors of the Bill of Rights and inevitably to force criminal defendants in Ohio to choose between their right to a preliminary hearing and their right of confrontation.

Proposition of Law Two:

THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT IS VIOLATED WHEN THE RECORDED HEARING TESTIMONY OF AN UNAVAILABLE WITNESS, NOT SUBJECT TO ACTUAL CROSS-EXAMINATION AT THE PRELIMINARY HEARING, IS ADMITTED INTO EVIDENCE AT AN ACCUSED'S TRIAL.

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[38] *Id.*

A. The case law supports the proposition that the mere opportunity for cross-examination of the witness at the preliminary hearing does not satisfy the Confrontation Clause.

The Sixth Amendment to the United States Constitution states in part that: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . ." This guaranty of the Sixth Amendment, referred to as the Confrontation Clause, was held to be applicable to the states, by virtue of the Fourteenth Amendment, in *Pointer v. Texas*.[39] In *Pointer, supra*, this Court declared that: "[t]here are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."[40]

In 1895, this Court, in *Mattox v. United States*,[41] discussed the nature and purpose of the Confrontation Clause, concluding that:

> "[t]he primary object of the [Confrontation Clause of the Sixth Amendment] was to prevent depositions or *ex parte* affidavits. . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has the opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."[42]

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[39] *Supra*, Note 12.

[40] 380 U.S. at 405.

[41] *Supra*, Note 3.

[42] 156 U.S. at 242-243.

In a more recent decision, this Court reiterated the view expressed in *Mattox, supra*, regarding the purpose of the Confrontation Clause, by stating, in *Barber v. Page*,[43] that: "[t]he right of confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness."[44] These cases recognize that the Confrontation Clause, literally read, requires, at a minimum, the presence of adverse witnesses at the trial of the accused and the opportunity for the accused to examine the witnesses face-to-face, in the presence of the trial factfinder.

However, this Court and other courts have created exceptions to the literal reading of the Confrontation Clause, based upon considerations of public policy and necessity, in cases in which a witness is for some reason unavailable to testify at the trial of the accused. In *Clyde Mattox v. United States*,[45] this Court upheld, as a matter of necessity, the admissibility of dying declarations against an accused in a homicide case. In *Mattox v. United States*,[46] this Court held that the Confrontation Clause was not violated by the admission of a deceased witness' testimony, taken at a former trial, at the second trial of the criminal defendant. In so holding, the Court stated that: "[t]he substance of the constitutional protection [of the Confrontation Clause] is preserved to the prisoner in the advantage he has once had of seeing the witness face to face and of subjecting him to the ordeal of cross-examination."[47] Therefore, as long as the accused was able to cross-examine the witness at the previous trial, the Court decided that the Confrontation Clause was satisfied and that the prior testimony was admissible.

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[43] *Supra*, Note 20.

[44] 390 U.S. at 725. *See also Douglas v. Alabama*, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965).

[45] *Supra*, Note 2.

[46] *Supra*, Note 3.

[47] 156 U.S. at 245.

Later, this Court was faced with the question of whether it made any difference under the Confrontation Clause that the prior testimony of an unavailable witness, sought to be admitted at the trial of an accused, was taken at a preliminary hearing instead of a former trial. In *Motes v. United States*,[48] this Court held that the defendants' rights of confrontation had been violated by the admission at their trial of a witness' recorded preliminary hearing testimony, when the witness' unavailability was due to the negligence of the accused.[49]

Four years later in 1904, however, in *West v. Louisiana*,[50] this Court concluded that the admission of a deposition of an unavailable witness' preliminary hearing testimony at the defendant's trial was not violative of the Due Process Clause of the Fourteenth Amendment. The thrust of the decision was that the Due Process Clause did not prohibit the State of Louisiana from extending the common law rule and permitting the use at trial of the prior recorded testimony of a witness, who was permanently absent from the jurisdiction once he had been confronted by the defendant.[51] The Court spoke in terms of the "opportunity" for cross-examination as being a sufficient predicate for the recorded testimony's admissibility at trial. The defendant in *West, supra*, however, had more than the "opportunity" to cross-examine the witness at the preliminary hearing: the defendant's counsel had *actually* cross-examined the witness at the prior hearing. Thus, after *West, supra*, it is reasonable to conclude that the requirements of the Confrontation Clause were deemed to be satisfied only when it was shown that the

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[48] *Supra*, Note 5.

[49] The facts in *Motes v. United States, supra*, revealed that the counsel for four of the defendants had actually cross-examined the witness at the preliminary hearing.

[50] *Supra*, Note 8.

[51] The Court in *West v. Louisiana, supra*, refused to consider the Sixth Amendment claim raised by the defendant-appellant, holding that the Sixth Amendment was not applicable to state proceedings. However, the Court, in *Pointer v. Texas, supra*, specifically overruled this interpretation of the Sixth Amendment.

witness, whose recorded preliminary hearing testimony was sought to be admitted at trial, was *in fact* cross-examined at the preliminary hearing and was unavailable to testify at trial for reasons other than the fault of the State.

In *Pointer v. Texas, supra*, decided by this Court in 1965, the defendant, although not represented by counsel, did have the "opportunity" to cross-examine the chief prosecution witness, the victim of a robbery allegedly committed by the defendant, at his preliminary hearing, but did not actually cross-examine the witness. He did, however, attempt to cross-examine some other witnesses at the hearing. This Court, after holding that the Confrontation Clause of the Sixth Amendment was applicable to the States, concluded that the defendant's right of confrontation had been violated. This Court stated that:

> This case before us would be quite a different one had [the witness'] statement been taken at a full-fledged hearing at which [the defendant] had been represented by counsel who had been given a complete and adequate opportunity to cross-examine. Compare *Motes v. United States* . . .[52]

This Court in *Pointer, supra*, thus spoke in terms of the "complete and adequate opportunity" for cross-examination by the defendant's counsel. The Court's language here could be interpreted as requiring only that the defendant have the assistance of counsel at the preliminary hearing and that the counsel have the opportunity, whether or not actually exercised, to cross-examine the witness. However, the Court cited to *Motes, supra*, as a case in comparison. In *Motes*, the defendants did have counsel at the preliminary hearing, at which time the attorney *actually* cross-examined the later-unavailable witness. Therefore, by virtue of the comparison to *Motes, supra*, and of the fact that Pointer was unrepresented by counsel and did not cross-examine the witness at all, this Court in *Pointer, supra*,

[52] 380 U.S. at 407.

arguably intended for the words, "complete and adequate opportunity to cross-examine," to encompass both the assistance of counsel and *actual* cross-examination of the witness at the preliminary hearing.

In 1968, this Court decided *Barber v. Page*.[53] In *Barber*, this Court found that the defendant's right of confrontation had been violated by the admission at his trial of the recorded preliminary hearing testimony of an absent witness, since the State had not made a good-faith effort to secure the presence of the witness at trial. This Court went on to state that:

> [m]oreover, we would reach the same result on the facts of this case had [Barber's] counsel actually cross-examined [the witness] at the preliminary hearing. See *Motes v. United States* . . .[54]

Clearly, this Court felt that it did not have to reach the issue of whether the mere opportunity for cross-examination or actual cross-examination was required under the Confrontation Clause, since the State had not properly established the unavailability of the witness. The Court, in dictum, does state, however, that:

> there may be some justification for holding that the *opportunity* for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable. . .[55]

Yet, this Court in *Barber, supra*, did not discuss what was encompassed by the term, "opportunity". There was actual cross-examination of the witness at the preliminary hearing by the defendants in the three cases cited by this Court in

[53] *Supra*, Note 20.

[54] 390 U.S. at 725.

[55] *Id.* at 725-726 (italics added).

Barber, supra, as being comparable in result to the decision reached in *Barber*.[56] *Barber* is, on the whole, not persuasive on the proposition that the mere opportunity for cross-examination of the witness at the preliminary hearing satisfies the Confrontation Clause.

Lastly, this Court, in *California v. Green*,[57] addressed once again the issue of whether the Confrontation Clause is violated by the admission into evidence at trial of an unavailable witness' recorded preliminary hearing testimony. In *Green, supra*, the witness was actually present at the defendant's trial, yet he was uncooperative on the stand and claimed he could not remember certain details concerning the alleged offense. The prosecution read parts of the witness' preliminary hearing testimony into evidence, for the truth of the matter therein, and the prior testimony also allegedly "refreshed" the recollection of the witness.[58] The California District Court of Appeals reversed the defendant's conviction, concluding that his right of confrontation had been violated, and the California Supreme Court affirmed.[59] This Court reversed, however, finding that the witness' preliminary hearing testimony "was admissible as far as the Constitution is concerned wholly apart from the question of whether [the defendant-respondent] had an effective opportunity for confrontation at the subsequent trial."[60]

This Court reasoned that if the witness had died or was otherwise unavailable at the trial, then "the right of confrontation [afforded at the preliminary hearing would have provided] . . .

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[56] The Court in *Barber v. Page, supra* cited to *Motes v. United States, supra, Holman v. Washington*, 364 F. 2d 618 (5th Cir. 1966), and *Government of the Virgin Islands v. Aquino*, 378 F. 2d 540 (3rd Cir. 1967).

[57] *Supra*, Note 31.

[58] Certain prior inconsistent statements allegedly made by the witness were also admitted as substantive evidence by the trial court.

[59] *People v. Green*, 70 Cal. 2d 654, 75 Cal. Rptr. 782, 451 P. 2d 422 (1969).

[60] 399 U.S. at 165.

substantial compliance with the purposes behind the confrontation requirement, as long as the declarant's [unavailability was] in no way the fault of the State."[61] This Court refused to hold otherwise just because the witness actually appeared at the trial.

However, *Green, supra*, is not authority for the proposition that the mere opportunity for cross-examination of the witness at the preliminary hearing satisfies the Confrontation Clause. The defendant's counsel in *Green* extensively cross-examined the witness at the preliminary hearing. The Court recognized this fact, and noted that: "[defendant-respondent's] counsel does not appear to have been significantly limited in any way in the scope or nature of his cross-examination of the witness Porter at the preliminary hearing."[62] This statement by this Court implies that if the defendant's counsel had been limited, to a significant extent, in the scope or nature of his cross-examination, this Court may have reached a different result. Therefore, although this Court, in *Green, supra*, allowed the admission at trial of the "unavailable" witness' recorded preliminary hearing testimony, *Green* nevertheless appears to require, for Confrontation Clause purposes, that the witness be *actually* cross-examined by the defendant's counsel at the preliminary hearing.

B. In the present case, the witness, whose preliminary hearing testimony was admitted in her absence at the respondent's trial, was not cross-examined by the respondent's counsel at the preliminary hearing.

The respondent was arrested on January 7, 1975, by the Mentor, Ohio, police and charged with forging a check, in the name of Bernard Isaacs, and with receiving stolen property, namely, certain credit cards belonging to Bernard Isaacs and Mrs. Isaacs. At his preliminary hearing on January 10, 1975,

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[61] *Id.* at 166.

[62] *Id.*

the respondent called, as a witness in his behalf, Bernard Isaacs' daughter, Anita Isaacs. She testified that she knew the respondent, who was the boyfriend of one of her friends, and that she had let her friend and the respondent use her apartment while she was on vacation. She also testified that she let the respondent use her apartment for a few days after she came back from vacation.

Ms. Isaacs then denied that she had given her parents' credit cards to the respondent or that she had talked to the respondent about letting him use the credit cards to purchase a television set. Although the respondent's counsel did ask the witness some questions at this point which could be characterized as "leading," since he was apparently surprised by her testimony, he did not ask that the witness be declared hostile by the court, and he did not ask to examine her as if on cross-examination.

The witness, Anita Isaacs, was not cross-examined by the respondent's counsel at the preliminary hearing. This fact was clearly recognized by the Ohio Supreme Court in this case.[63] The witness was called by the respondent's counsel and questioned on direct examination. It is true that some of the questions posed to the witness by the respondent's counsel were of a form generally associated with cross-examination. Yet, the respondent's counsel did not seek to have the witness declared hostile, as is his privilege in Ohio,[64] nor did he ask to examine the witness as on cross-examination.

The petitioner did not, at any time, object to the form or nature of any of the questions asked by the respondent's counsel. The petitioner had the opportunity to object to the questions as he saw fit at the hearing, but instead chose to waive any objections. The petitioner also chose not to cross-examine the witness. He should not be heard to complain at this point that

[63] The Ohio Supreme Court declared that: "[i]n the instant cause, of course, the witness was never cross-examined." *State v. Roberts*, 55 Ohio St. 2d 191, 199, 378 N.E. 2d 492 (1978).

[64] *See State v. Parrott*, 27 Ohio St. 2d 205, 272 N.E. 3d 112 (1971).

the questions asked of the witness by the respondent's counsel were somehow improper for or uncharacteristic of direct examination. It is not exalting form over substance to state that there was no cross-examination of the witness, Anita Isaacs, by the counsel for the respondent at the preliminary hearing. The form and substance of the respondent's questioning of the witness at the hearing was that of direct examination.

C. Because the respondent did not *in fact* cross-examine the witness, Anita Isaacs, at the preliminary hearing, the admission of the recorded preliminary hearing testimony of Ms. Isaacs, in her absence, at the respondent's trial violated the Confrontation Clause of the Sixth Amendment.

The recorded preliminary hearing testimony of Anita Isaacs, who was not located by the petitioner to testify at trial, was admitted into evidence over the respondent's objection, at the respondent's trial. This testimony was admitted by the trial court pursuant to Section 2945.49 of the Ohio Revised Code, which allows the use at trial of preliminary hearing testimony when the witness "cannot for any reason be produced at the trial." The respondent was subsequently found guilty of all counts against him by a jury, and the trial court entered judgment.

The Court of Appeals for Lake County, Ohio, reversed the respondent's convictions, finding that the admission of the prior recorded testimony violated the Confrontation Clause of the Sixth Amendment. The Court of Appeals based its decision on the failure of the State to show that it had made the requisite good-faith effort to secure the presence of the witness at the respondent's trial.

The Supreme Court of Ohio affirmed, not on the basis of the failure of the State to make a good-faith effort to procure the presence of the witness at trial,[65] but rather on the basis that:

[65] The Ohio Supreme Court, in *State v. Roberts, supra*, found that: "the trial judge could properly hold that the witness was unavailable to testify in person." 55 Ohio St. 2d at 195.

"the *mere opportunity* to cross-examine at the preliminary hearing cannot be said to afford confrontation for purposes of the trial."[66] The Ohio Supreme Court thus held that the Confrontation Clause precluded the use of a witness' recorded preliminary hearing testimony at a defendant's trial, notwithstanding Section 2945.49 of the Ohio Revised Code, where the witness was not cross-examined by the defendant at the preliminary hearing.

This Court should not disturb the findings of the Ohio Supreme Court in this case. The Ohio Supreme Court recognized that the respondent in this case did not in fact cross-examine the witness and, therefore, properly concluded, based upon the prior case law, that the mere opportunity for cross-examination does not satisfy the requirements of the Confrontation Clause of the Sixth Amendment.[67]

CONCLUSION

This Court should hold that Section 2945.49 of the Ohio Revised Code, to the extent that it permits the admission into evidence at a defendant's trial the recorded preliminary examination or preliminary hearing testimony of an unavailable witness, is unconstitutional, as violative of the Confrontation Clause of the Sixth Amendment to the United States Constitution.

Should this Court decide that Section 2945.49 of the Ohio Revised Code is not unconstitutional on its face, as it pertains to the admissibility of recorded preliminary hearing testimony at a defendant's trial, this Court should, nevertheless, affirm

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[66] *Id.* at 196-197 (italics added).

[67] The Ohio Supreme Court, in *State v. Smith*, 58 Ohio St. 2d 344, _____ N.E. 2d _____ (1979), broadened its holding in *Roberts, supra*, to include the preclusion at trial of an unavailable witness' recorded preliminary hearing testimony "where the record shows that the witness was cross-examined only briefly and ineffectively" at the preliminary hearing. 58 Ohio St. 2d at 347.

the Ohio Supreme Court's decision and hold that the admission at the defendant's trial in this case of the witness' recorded preliminary hearing testimony, absent any cross-examination of the witness at the hearing, violated the Confrontation Clause of the Sixth Amendment to the United States Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Steven M. Cox, a member of the bar of the Supreme Court of the United States and counsel of record for the Ohio Public Defenders Association, *amicus curiae* herein, hereby certify that on August ___, 1979, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the attached Motion For Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* on each of the parties herein, as follows:

On State of Ohio, petitioner herein, by depositing such copies in the United States Post Office, Columbus, Ohio, with first class postage prepaid, properly addressed to the post office address of John E. Shoop, the above-named petitioner's counsel of record, at Lake County Court House, Painesville, Ohio 44077.

On Herschel Roberts, respondent herein, by depositing such copies in the United States Post Office, Columbus, Ohio with first class postage prepaid, properly addressed to the post office address of Marvin R. Plasco, the above-named respondent's counsel of record, at Western Reserve Law Building, 7556 Mentor Avenue, Mentor, Ohio 44060.

On the Solicitor General of the United States, *amicus curiae* herein, by depositing such copies in the United States Post Office, Columbus, Ohio, with first class postage prepaid, properly addressed to the post office address of Wade McCree, the above-named *amicus curiae's* counsel of record, at the Department of Justice, Washington, D.C. 20530.

All parties required to be served have been served. Dated August ___, 1979.

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Supreme Court of the United States

October Term, 1978
No. 78-756

STATE OF OHIO,
Petitioner,

vs.

HERSCHEL ROBERTS,
Respondent.

RESPONSE TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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RESPONSE TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The State of Ohio hereby respectfully objects to the entry of the Ohio Public Defenders Association as *amicus curiae* herein.

Rule 42(2) of the Rules of Practice provide that to appropriately enter a case as *amicus curiae*, a potential party must demonstrate (1) an interest in the case, (2) facts or questions which have not been presented by the parties or reasons for believing such facts or questions will not be adequately presented by the parties, and (3) the relevancy of such facts or questions to the disposition of the case.

While the Ohio Public Defenders Association may have an interest in this case, it cannot be said that the latter two requirements of Rule 42(3) have been met.

Respondent Herschel Roberts certainly has had no inadequate representation to date, as demonstrated by his

success in the Court of Appeals for Lake County and in the Ohio Supreme Court. The Public Defenders Association makes no suggestion that the same counsel who represented Roberts at trial and on appeal will not continue to raise facts and questions material to resolution of the issues presented in this case.

Indeed, although couched in different language, the issues presented and discussed by the Public Defenders Association in its brief are the *same* issues presented by respondent.

Therefore, because the Public Defenders Association has not complied with Rule 42(3) there is no need for this Court to burden itself with a brief which merely duplicates what has already been set forth by respondent, and this Court should deny the Ohio Public Defenders Association leave to file its proffered brief *amicus curiae*.

Respectfully submitted,

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